**IN THE LABOUR COURT OF SOUTH AFRICA**
**HELD AT JOHANNESBURG**

**CASE NO. JR1158/07**

In the matter between:

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| **FEDCRAW** | **1ST Applicant** |
| **JOSHUA KETLELE** | **2ND Applicant** |

and

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| **COMMISSION FOR CINCILITION, MEDIATION AND ARBITRATION** | **1ST Respondent** |
| **COMMISSIONER ENRICO HONNORAT** | **2ND Respondent** |
| **WENPRO MARKETING AGENTS** | **3RD Respondent** |

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**EX TEMPORE JUDGMENT**

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**VAN NIEKERK J**

[1] This is an application to review and set aside the ruling made by the second respondent ("the commissioner"), when on 28 March 2007 he rescinded an arbitration award made in the absence of the third respondent on 31 May 2004. In the rescission ruling, which the commissioner recorded was unopposed, the commissioner found that the third respondent had proved the absence of wilful default on

the basis that the notice to attend the arbitration hearing sent by tele fax, had failed to come to the attention of anyone in the third respondent's employ. The commissioner further found that the third respondent had established *prima facie* prospects of success in the form of documentary proof of a dismissal for misconduct.

[2] This matter has an unfortunate history. On 31 May 2004, as I have already indicated, the commissioner made his arbitration award. The award records that the commissioner satisfied himself that the notice of set down in the matter had been sent successfully to the third respondent's tele fax number and that in these circumstances he was entitled to proceed to make a default award, which he duly did. The award came to the third respondent's attention, so alleges the first applicant, on 10 June 2004 when the first applicant sent a copy of the award to the third respondent with a covering letter demanding compliance with the terms of the award. On 28 June 2004 the third respondent served an application to rescind the award on the applicant. Attached to the application was an affidavit deposed to by the third respondent's then attorney of record. On 8 July 2004 the applicant filed a notice of intention to oppose the application for rescission together with an answering affidavit. Nothing further appears to have transpired in that application until September 2005, more than a year later when the applicant filed an application in terms of section 143 of the Act to have the arbitration award certified. The award was certified on 20 September 2006. On 4 October 2006, a writ of execution was issued by the registrar of this court. On 30 October 2006, the third respondent filed a fresh application to rescind the arbitration award made on 31 May 2004. In this application, the third respondent claimed that the arbitration award had come to its attention only on 26 October 2006. On 3 November 2006, the applicant filed a notice of intention to oppose the application for rescission together with what it termed a replying affidavit. On 10 November 2006, the third respondent filed what was termed a responding affidavit raising a point *in limine* in response to

the answering affidavit.

[3] Despite the voluminous papers filed in this matter by both parties, it is relatively easily dealt with. Contrary to what the commissioner recorded, the application for rescission was clearly opposed, given the fact that the notice of intention to oppose the application, an answering affidavit and a replying affidavit had been filed. For the commissioner to have treated the matter as unopposed is inexplicable. The applicant in these proceedings has alleged that the commissioner "Was telling an untruth" when he stated that the application for rescission was not opposed and that he committed a gross irregularity in treating it as such. It may well be that the papers filed in this matter never found their way into the file before the commissioner made the rescission ruling. That is impossible for this court to determine. What this court has before it, however, is an averment to the effect that the commissioner committed a reviewable irregularity in treating the matter as unopposed. The commissioner has elected not to oppose these proceedings. Had the matter appeared to him to have been unopposed and had he dealt with it on that basis, he should have filed an affidavit to that effect. In the absence of such evidence, the court has no option but to accept the veracity of the averment made by the applicants in these proceedings and to accept that the commissioner misconducted himself when he treated the matter as unopposed. For these reasons, in my view, the commissioner's ruling stands to be reviewed and set aside.

I accordingly make the following order:

1. The ruling made by the second respondent on 28 March 2007 is reviewed and set aside.

2. The matter is referred back to the CCMA to be considered afresh as an opposed application by another commissioner.

3. There is no order as to costs.

**ANDRE VAN NIEKERK**
**JUDGE OF THE LABOUR COURT**

Date of Hearing: 18 June 2009
Date of judgment: 19 June 2009

Appearances:

For the applicant: Ms J Duba (union Official)

For the Respondent: Mr N Hannay (GDP Official)