



CCMA

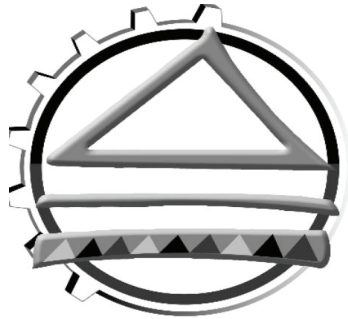
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION



PRACTICE AND PROCEDURE MANUAL

7th Edition

November 2014



CCMA

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Chapter 1: Introduction

- 1.1 This manual records the practices and procedures of the CCMA. It is a work in progress and the intention is to continuously improve and update it, particularly as and when practices and procedures change. The manual is written in a question and answer format. It was not intended to cover every possible question. The questions covered are those which most commonly arise in the every day work environment.
- 1.2 The purpose of the manual is-
- to be a reference of the practices and procedures of the CCMA;
 - to assist and support CCMA staff in the performance of their functions;
 - to promote consistency in the performance of the CCMA functions; and
 - to improve the quality of the services that the CCMA renders.
- 1.3 The following features of the manual will assist users in finding relevant topics:
- The content page provides a list of the topics covered in each chapter;
 - The pages are numbered in such a way that the chapter number is indicated on each page e.g. the page number 202 indicates that it is the second page of the second chapter and the number 1003 indicates that it is the third page of the tenth chapter;
 - At the commencement of each chapter the contents of that particular chapter are set out;
 - The index provides links between chapters and key words.

- 1.4 The electronic version contains hyperlinks between each chapter listed in the table of contents and the first page of the chapter. To go to the commencement of the chapter press “control” and click on the name of the chapter. The electronic version also contains hyperlinks between each question listed at the commencement of a chapter and the paragraph dealing with the question. To go to the paragraph dealing with the question, press “control” and click on the question. To return to the commencement of the chapter from the paragraph dealing with the question press “control” and click on the question. To return to the table of contents from the commencement of a chapter press “control” and click on the name of the chapter.

Chapter 2: Functions, Jurisdiction and Powers Generally

Contents

- 2.1 What are the obligatory functions of the CCMA?
- 2.2 What are the discretionary functions of the CCMA?
- 2.3 What is meant by jurisdiction?
- 2.4 In what geographical area may the CCMA exercise its powers and where must such powers be exercised?
- 2.5 Who are the parties in respect of whom the CCMA has jurisdiction?
- 2.6 In respect of what parties does the CCMA not have jurisdiction?
- 2.7 What categories of disputes may generally be conciliated by the CCMA?
- 2.8 What disputes must be arbitrated by the CCMA?
- 2.9 Under what circumstances does the CCMA have jurisdiction to arbitrate an unfair dismissal dispute involving a dismissal for operational requirements of a single employee?
- 2.10 Under what circumstances does the CCMA have jurisdiction to arbitrate a dispute about the interpretation or application of a settlement agreement?
- 2.11 What disputes fall under the jurisdiction of councils and what are the CCMA's powers in respect of such disputes if they are referred to the CCMA?
- 2.12 If parties have agreed in a collective agreement to refer the disputes about the interpretation or application of the collective agreement for resolution in terms of a procedure provided for in the agreement, what are the CCMA's powers if such disputes are subsequently referred to it?
- 2.13 If parties have agreed in a private agreement that disputes between them ought to be resolved through private dispute resolution, what are the CCMA's powers if such disputes are subsequently referred to it?
- 2.14 Where applicable what should be taken into account in exercising a discretion (should one exist), whether the CCMA should continue to resolve the dispute or whether the dispute should be referred to the appropriate person, bargaining council or other body with jurisdiction?
- 2.15 What are the procedural requirements for each process and what relief may be awarded?

2.1 What are the obligatory functions of the CCMA?

In terms of section 115 (1) of the LRA the CCMA must, *inter alia* –

- 2.1.1 attempt to conciliate any dispute referred to it in terms of the LRA and EEA; arbitrate a dispute that remains unresolved after conciliation, if it has the powers to do so;
- 2.1.2 perform any other duties imposed on it by or in terms of the applicable employment law;
- 2.1.3 compile and publish information and statistics about its activities; and
- 2.1.4 review the Rules at least every two years.

2.2 What are the discretionary functions of the CCMA?

In terms of section 115 (2), (2A) and (3) of the LRA the CCMA may, *inter alia* -

- 2.2.1 if asked, advise a party to a dispute about the procedure to follow in terms of the LRA;
- 2.2.2 if asked, assist a party to obtain legal advice, assistance or representation;
- 2.2.3 if requested, provide administrative support to an employee earning below than the BCEA threshold;
- 2.2.4 offer to resolve a dispute that has not been referred to it through conciliation;
- 2.2.5 make rules regulating the matters referred to in section 115 (2A) of the LRA;
- 2.2.6 conduct, oversee or scrutinise any election or ballot of a registered union or employers' organisation if asked to do so by that trade union or employers' organisation;
- 2.2.7 publish guidelines in relation to any matter dealt with in terms of the applicable employment law;
- 2.2.8 conduct and publish research into matters relevant to its function; and
- 2.2.9 if asked, provide employees, employers, registered trade unions, registered employers' organisations, federations of trade unions, federations of employers' organisations or councils, with advice or training relating to the primary objects of the LRA, or any other employment law.

2.3 What is meant by jurisdiction?

- 2.3.1 Jurisdiction means the power or competence of the CCMA to hear and determine an issue between parties i.e. to conciliate and arbitrate disputes between parties.¹ Limitations are placed on such power or competence in relation to territory, parties, nature of dispute, procedural requirements and where applicable, the extent of the CCMA's powers, e.g. relief that may be awarded.
- 2.3.2 The CCMA is an independent juristic body established in terms of section 112 of the LRA. As such it does not have inherent jurisdiction. Further, it does not derive its jurisdiction from the common law like the High Court, but solely from Acts of Parliament. The CCMA mainly derives its jurisdiction from the LRA but to a limited extent also from the BCEA, the EEA, the SDA and the Mine Health and Safety Act and other statutes. These statutes indicate the jurisdiction of the CCMA by providing for the disputes that it may conciliate and arbitrate, the geographical area in respect of which it has jurisdiction, the categories of persons in respect of which it has jurisdiction, the procedural requirements for exercising its powers and the limitations on such powers.

2.4 In what geographical area may the CCMA exercise its powers and where must such powers be exercised?

- 2.4.1 In terms of section 114 of the LRA the CCMA has jurisdiction in all the provinces of the Republic. By virtue of the provisions of the Maritime Zones Act, No 15 of 1994, this area extends to internal and external waters and the airspace above it, as well as to certain off shore zones such as installations, platforms, and exploration or production vessels. It does not extend to embassies, because of the provisions of the Foreign States Immunities Act, No 87 of 1991.²
- 2.4.2 Generally, the CCMA has jurisdiction to resolve a dispute if the employer's undertaking in which the employee worked (works) was/is carried on inside the Republic.³
- 2.4.3 A party to a dispute does not have a choice as to where conciliations and arbitrations should take place. A dispute must be conciliated or arbitrated in the region in which the cause of action arose (usually where the workplace was), unless a senior commissioner in the head office of the CCMA directs otherwise.⁴
- 2.4.4 If there are reasons why a dispute should be arbitrated in a region other than the region where the dispute arose, an application should be made for the dispute to be conciliated or arbitrated in a different region. Unless it was authorised by a senior commissioner in the head office of CCMA, regional

¹ *Gcaba v Minister of Safety & Security & others* (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 680 (LC) at par 74

² See Chapter 28 below as to the procedure to be followed in the case of diplomatic and consular missions

³ *Astral Operations Ltd v Parry* (2008) 29 ILJ 2668 (LAC) at para 19

⁴ Rule 24

offices of the CCMA do not have jurisdiction to conciliate or arbitrate disputes that arose in other regions.

2.5 Who are the parties in respect of whom the CCMA has jurisdiction?

- 2.5.1 In general, the parties to a dispute must be an employee (or registered trade union) and an employer (or registered employers' organisation). One notable exception is a job applicant claiming unfair discrimination.
- 2.5.2 "*Employee*" means (a) any person, excluding an independent contractor, who works for any person or for the State and who receives or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "*employed*" and "*employment*" have meanings corresponding to that of "employee."⁵
- 2.5.3 The existence of a valid contract of employment is not a prerequisite for the existence of the employment relationship envisaged by the LRA. For this reason sex workers are not excluded from the definition of employee by virtue of the fact that prostitution is against the law.⁶
- 2.5.4 In terms of the Constitution, like in the case with other employees, the dignity of **sex workers** in an employment relationship is protected. To that extent the constitutional right to fair labour practices extends to sex workers. Generally they are not entitled to the kind of relief that would recognise or enforce an illegal employment contract and for that reason reinstatement or re-employment or compensation for the loss of the illegal work should not be awarded. Compensation in the form of a *solatium* may however be awarded in the case of procedurally unfair dismissals.⁷
- 2.5.5 In the case of **foreign nationals**, by criminalising only the conduct of the employer who employs a foreigner who does not have a work permit and by failing to prescribe explicitly a contract of employment concluded in these circumstances, the Legislator did not intend to render invalid the underlying employment contract. The CCMA therefore has the power and competence to conciliate and arbitrate disputes referred to it in terms of the LRA even though the referring party is a foreign national. Reinstatement or re-employment may however not be awarded as that would require of an employer to do something that the law does not permit.⁸
- 2.5.6 While employees must be natural persons, the employer party is most often a juristic person, in other words, a legal entity made up of natural persons but separate and distinct from the natural persons.

⁵ See the definition of employee in section 213 of the LRA. See also the Code of Good Practice on who is an Employee

⁶ See "*Kylie*" v CCMA & others (2010) 31 ILJ 1600 (LAC)

⁷ See "*Kylie*" v CCMA & others (above)

⁸ See *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC)

- 2.5.7 Some employers may be single individuals, generally referred to as “*sole proprietors*”, who own the business. The sole proprietor will be personally liable or responsible for the actions of the business since the employer in this regard is the sole proprietor in his/her personal capacity.
- 2.5.8 More frequently, however, businesses are run as separate juristic persons, such as, a close corporation, a private company (having “(Pty) Ltd” after the name of the company) or a public company (having “Ltd” after the name of the company).
- 2.5.9 In cases of insolvency or liquidation or death of an employer, or where the employer is a mental patient, the trustee, liquidator, executor or curator, as the case may be, in his/her official capacity may be a party to the dispute.

The CCMA (and not any public service bargaining council) has jurisdiction over certain organs of state which are created in terms of legislation.

2.6 In respect of what parties does the CCMA not have jurisdiction?

- 2.6.1 Genuine **independent contractors** are excluded from the jurisdiction of the CCMA
- 2.6.2 The distinction between employees and independent contractors is that “an independent contractor undertakes the performance of certain specified work or the production of a certain specified result. An employee at common law, on the other hand, undertakes to render personal services to an employer. In the former case it is the product or result of the labour, which is the object of the contract and in the latter case the labour as such is the object. Put differently, ‘an employee is a person who makes over his or her capacity to produce to another; an independent contractor, by contrast, is a person whose commitment is to the production of a given result by his or her labour”.⁹
- 2.6.3 In terms of a statutory presumption contained in section 200A of the LRA, until the contrary is proved, a person who renders services to any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the rebuttable factors are present.¹⁰
- 2.6.4 Even if the wording of the contract between the parties stipulates that the person providing the service is an independent contractor, if any one of the rebuttable factors is present, that person is presumed to be an employee unless the contrary is proved. The presumption is only applicable if the person concerned was earning less than the BCEA threshold.¹¹ The presumption assists an applicant who proves one or more of the factors referred to in section 200A. Once an applicant has proved that one or more

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⁹ *Niselow v Liberty Life Association of South Africa Ltd* (1998) 19 ILJ 752 (SCA); *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 at 61B and *Brassey The Nature of Employment* (1990) 11 ILJ 889 at 899. See also the Code of Good Practice on who is an Employee

¹⁰ Section 200A of the LRA

¹¹ Currently R205 433.30 per annum with effect from 1 July 2014

of the factors are present, it will be up to the respondent to prove that despite the existence of such factors, the applicant is not an employee but an independent contractor.

2.6.5 **Members of the National Defence Force, the National Intelligence Agency and the South African Secret Service and the South African National Academy of Intelligence and Comsec** are also excluded from the ambit of the LRA and in relation to those members only, their employers are excluded as well.¹²

2.6.6 **Diplomatic missions and consulates, certain accredited international organisations and certain of their representatives enjoy immunity in certain circumstances** which are dealt with in Chapter 28.

2.6.7 **Magistrates** are not employees within the meaning of the LRA.¹³

2.6.8 A **member of a worker co-operative** is not an employee as defined in terms of the LRA and the BCEA in terms of Item 6 of Part 2 of Schedule 1 to the Co-operatives Act 2005.

2.7 What categories of disputes may generally be conciliated by the CCMA?

2.7.1 The obligatory function of the CCMA conciliate disputes is defined by the provisions of section 133 (1) of the LRA.

2.7.2 Except where the LRA requires that the dispute be resolved by a bargaining council, the CCMA attempt to resolve the following categories of disputes through conciliation -

- Disputes referred to the CCMA for conciliation in terms of specific sections of the LRA by the party mentioned in the particular section.
- Other disputes that may be referred are matters of mutual interest.¹⁴

2.7.3 The disputes that the CCMA attempt to resolve through conciliation include the following

- disputes about the interpretation or application of the provisions of Chapter II dealing with freedom of association and general protections – section 9 of the LRA;
- disputes about disclosure of information - section 16 of the LRA;
- disputes about organisational rights - sections 21 and 22 of the LRA;

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¹² Section 2 of the LRA

¹³ *Khanyile v CCMA & others* [2005] 2 BLLR 138 (LC)

¹⁴ *Sithole v Nagwaza NO & others* [1999]12 BLLR 1348 (LC) at 315 and *De Beers Consolidated Mines Ltd v CCMA and others* [2000] 5 BLLR 578 (LC)

- disputes about the interpretation or application of collective agreements where the collective agreement does not provide for a dispute resolution procedure, where the procedure is inoperative or where one party frustrates the process - section 24 (2) to (5) of the LRA;
- disputes about the interpretation or application of settlement agreements – section 24 (8) of the LRA;
- disputes about agency shop and closed shop agreements – section 24 (6) of the LRA;
- disputes about determinations made by the Minister in respect of proposals made by statutory councils – section 45 of the LRA;
- disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled – section 61(5) to (13) of the LRA;
- disputes about the interpretation or application of Parts A and C to F of Chapter III dealing with organisational rights, bargaining councils, public service bargaining councils, statutory councils and general provisions relating to councils, unless the dispute arose in the course of arbitration proceedings under the auspices of a council – section 63 of the LRA;
- disputes concerning pickets – section 69 (8) to (10) of the LRA;
- disputes in essential services – section 74 of the LRA;
- disputes about proposals that are the subject of a joint decision making in workplace forums unless an agreed procedure provides for arbitration under the auspices of a different forum – section 86 of the LRA;
- disputes about disclosure of information to workplace forums – section 89 of the LRA;
- disputes about the interpretation or application of the provisions of Chapter V dealing with workplace forums – section 94 of the LRA;
- mutual interest disputes – section 133 read with section 134 of the LRA;
- all unfair dismissal disputes and unfair labour practice disputes – section 191(1)(a) of the LRA;
- any dispute arising from the interpretation or application of Section 198A, 198B and 198C;

- severance pay disputes – section 41 of the BCEA;
- disputes about payment of statutory monies as consolidated in terms of section 74 of the BCEA;
- disputes about the disclosure of information needed for consultation regarding affirmative action – section 18 of the EEA;
- disputes regarding unfair discrimination based on listed and unlisted grounds, harassment and equal pay for work of equal value - section 6 EEA;
- disputes regarding interpretation or application of Part C of the EEA which deals with the protection of employees - section 52 of EEA
- disputes about learnerships – section 19 of the SDA;
- disputes regarding the number of full-time health and safety representatives – section 26 (11) of the MHSA;
- disputes about the disclosure of information – section 39 of the MHSA; and
- disputes about the interpretation or application of Chapter 3 of the MHSA – section 40 of the MHSA.

2.7.4 The CCMA has a discretionary function to conciliate disputes other than those referred to in paragraph 2.7.2 above. With the consent of the parties or in the absence of consent, if the Director believes it is in the public interest to do so irrespective of whether the dispute was referred to the Commission.¹⁵

2.8 What disputes must be arbitrated by the CCMA?

2.8.1 The CCMA arbitrates disputes that remain unresolved after an attempt at conciliation -

- if the LRA requires such disputes to be resolved through arbitration by the CCMA; or
- where the LRA requires that the dispute be adjudicated by the Labour Court, if all parties to the dispute have consented in writing to arbitration by the CCMA.¹⁶

2.8.2 The disputes that the CCMA is obliged to arbitrate include the following -

- disputes about disclosure of information – section 16 of the LRA;

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¹⁵ Section 150

¹⁶ Section 133(2) and section 136(1)

- disputes about organisational rights – sections 21 and 22 of the LRA;
- disputes about the interpretation or application of collective agreements where the collective agreement does not provide for a dispute resolution procedure, where the procedure is inoperative or where one party frustrates the process – section 24 (2) to (5) and 147 (1) (a) (ii) of the LRA;
- disputes about the interpretation or application of settlement agreements – section 24 (8) of the LRA;
- disputes about agency shop and closed shop agreements – section 24 (6) of the LRA;
- disputes about determinations made by the Minister in respect of proposals made by statutory councils – section 45 of the LRA;
- disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled – section 61 (5) to (13) of the LRA;
- disputes about the demarcation of sectors and areas of councils – section 62 of the LRA;
- disputes about proposals that are the subject of joint decision making in workplace forums unless an agreed procedure provides for arbitration under the auspices of a different forum – section 86 of the LRA;
- disputes about disclosure of information to workplace forums – section 89 of the LRA;
- disputes about the interpretation or application of the provisions of Chapter V dealing with workplace forums – section 94 of the LRA;
- unfair dismissal disputes, where the reason for dismissal relates to conduct or capacity, excluding participation in an unprotected strike - section 191(5) (a) (i) of the LRA;
- unfair dismissal disputes where the employer has made continued employment intolerable or where the employer has provided the employee with substantially less favourable conditions or circumstances at work after a transfer, subject to exceptions - section 191 (5) (a) (ii) of the LRA
- unfair dismissal disputes where the employee does not know the reason for dismissal – section 191 (5) (a) (iii) of the LRA;
- unfair dismissal disputes involving a dismissal by reason of operational requirements following a consultation process that applied to that employee only or more or the employer employs less than 10

employees, irrespective of the number of employees who are retrenched– section 191(12) of the LRA;

- unfair labour practice disputes – section 191(5) (a) (iv) of the LRA;
 - any dispute arising from the interpretation of section 198A, 198B and 198C;
 - severance pay disputes – section 41 BCEA;
 - disputes regarding payment of statutory monies when consolidated– section 74 of the BCEA;
 - disputes about the disclosure of information needed for consultation regarding affirmative action – section 18 of the EEA;
 - disputes about learnerships – section 19 of the EEA;
 - unfair discrimination disputes based on sexual harassment - section 10(Aa) (ii) of the EEA (regardless of the BCEA threshold) where the applicant elects arbitration;
 - unfair discrimination disputes based on listed or unlisted grounds if the employee earns less than the BCEA threshold and the applicant elects arbitration;
 - disputes regarding the number of full-time health and safety representatives – section 26 (11) of the MHSA;
 - disputes about the disclosure of information – section 39 of the MHSA; and
 - disputes about the interpretation or application of Chapter 3 – section 40 of the MHSA;
 - disputes in respect of which the Labour Court has jurisdiction if all the parties to the dispute consent in writing to arbitration by the CCMA– section 133 (2) (b) read with section 141 of the LRA; and
 - disputes about matters of mutual interest in essential services.
- 2.8.3 The CCMA has no authority to arbitrate any dispute other than the disputes that it is authorised to arbitrate in terms of specific provisions of the LRA and the other Acts referred to above and may not arbitrate such other disputes even if the parties to such disputes consent to arbitration by it.

2.9 Under what circumstances does the CCMA have jurisdiction to arbitrate an unfair dismissal dispute involving a dismissal for operational requirements of a single employee?

- 2.9.1 If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only or more, the employee may elect to refer the dispute either to the Labour Court or the CCMA.¹⁷
- 2.9.2 Such an employee has such a choice irrespective of whether the dispute also involves procedural unfairness.¹⁸
- 2.9.3 Such an employee has the choice even if no procedure was followed.¹⁹
- 2.9.4 The CCMA's jurisdiction has also been extended by the amendment of section 191 (12) to cases where the employer employs less than ten employees irrespective of the number of employees who are retrenched.

2.10 Under what circumstances does the CCMA have jurisdiction to arbitrate a dispute about the interpretation or application of a settlement agreement?

- 2.10.1 If there is a dispute about the interpretation or application of a settlement agreement contemplated in either section 142A or 158 (1) (c), a party may refer the dispute to a council or the CCMA and subsection 24 (3) to (5) with the necessary changes apply to that dispute.²⁰
- 2.10.2 The settlement agreement need not be a collective agreement²¹ but the following requirements have to be met²² -
- The alleged settlement agreement must be in writing;
 - The agreement must be in settlement of a dispute that a party has the right to refer to the CCMA or to the Labour Court;
 - The dispute must be about the interpretation or application of the agreement;²³
 - The dispute must not relate to essential services or maintenance services; and
 - The general jurisdictional requirements for arbitration must be met.

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¹⁷ Section 191(12)

¹⁸ *Scheme Data Services (Pty) Ltd v Myhill N.O. & others (2009) 30 ILJ 399 (LC); Ngidi and Fidelity Supercare Services Group (Pty) Ltd (2009) 30 ILJ 1185 (CCMA); Bracks NO & another v Rand Water & another (2010) 31 ILJ 897 (LAC); [2010] 8 BLLR 795 (LAC)*

¹⁹ *Rowmoor Investment (Pty) Ltd v Wilson & others (2008) 29 ILJ 2275 (LC)*

²⁰ Section 24 (8)

²¹ *To the extent that the contrary was suggested in First National Bank Ltd (Wesbank Division) v Mooi NO & others (2009) 30 ILJ 336 (LC) it was obiter dictum and not binding on arbitrators. See Drummer and Polaris (2009) 30 ILJ 2179 (CCMA) and Sivraj v Caspian Feight CC (Case Nos. KZNRFBFC 2390 and 9092)*

²² See chapters 10 and 19

²³ See the chapter 10

2.11 What disputes fall under the jurisdiction of councils and what are the CCMA's powers if such disputes are referred to it?

- 2.11.1 Certain disputes are to be resolved by councils and not by the CCMA.
- 2.11.2 The powers and functions of bargaining councils appear from section 28 of the LRA while the powers and functions of a statutory council appear from section 43 of the LRA. Their functions include the performance of the dispute resolution functions referred to in section 51.
- 2.11.3 In terms of section 51 (2) (a) **parties²⁴ to a council** must attempt to resolve any dispute between themselves in accordance with the constitution of the council. In the case of a bargaining council such constitution must, in terms of section 30 (1), provide for -
- the determination, through arbitration, of any dispute arising between the parties to the bargaining council, about the interpretation or application of the bargaining council's constitution;
 - the procedure to be followed if a dispute arises between the parties to the bargaining council;
 - the procedure to be followed if a dispute arises between a registered trade union that is a party to the bargaining council, or its members, or both, on the one hand, and employers who belong to a registered employers' organisation that is a party to the bargaining council, on the other hand.

The procedures for the resolution of the disputes may, in terms of section 30 (5), not entrust dispute resolution functions to the CCMA unless the governing body of the CCMA has agreed thereto. In terms of section 43 (2)A a statutory council may in its constitution agree to the inclusion of any of the functions of a bargaining council referred to in section 28 including the dispute resolution functions mentioned in that section.

- 2.11.4 In terms of section 51(3) read with sections 51 (2) (b), 51 (4) and 52, a council further has the power and the obligation to resolve disputes referred to it by **a party who is not a party to the council but who falls within its registered scope** provided -
- the dispute is referred to the council in terms of the LRA, i.e. the LRA must make provision for such disputes to be referred to the council;
 - the other party must also fall within the council's registered scope; and
 - the council is accredited by the CCMA to perform such function.

²⁴ For this purpose a party to a bargaining council includes a member of a party. See section 51(2)(a)(ii)

- 2.11.5 Before a council may perform a dispute resolution function in respect of disputes involving one or more parties who fall within the registered scope of the council but are not parties to the council (even though one or more of the other parties to the dispute may be parties to the council), it must be accredited by the governing body of the CCMA to perform such functions.
- 2.11.6 Insofar as accreditation is needed a council must apply to the governing body for accreditation in terms of section 127. In terms of section 127(4) the governing body may accredit an applicant to perform any function mentioned in section 127 (1) for which it seeks accreditation except those functions that are specifically excluded in section 127 (2). The terms of the accreditation must, in terms of section 127 (6), state the extent to which the provisions of each section in Part C of Chapter VII apply to the accredited council. The accreditation may accordingly be limited to conciliation only and the conciliation function itself may be limited to certain kinds of disputes. Where a council is accredited to resolve disputes through arbitration, the accreditation may further be limited to specified disputes. Accreditation to resolve disputes through arbitration normally includes pre-dismissal arbitrations.
- 2.11.7 As the LRA, in section 52 thereof, only requires accreditation of councils in respect of disputes involving non-parties falling within the registered scope of the council, no accreditation is needed by councils to perform a dispute resolution function in respect of disputes between parties to the council.
- 2.11.8 In similarly worded sections of the LRA and the BCEA, (section 191 of the LRA and section 41(6) of the BCEA), provision is made that a dispute may be referred for conciliation to –
- a council, if the parties to the dispute fall within the registered scope of that council; or
 - the CCMA, if no council has jurisdiction.

In respect of some disputes there are further provisions that should such disputes not be resolved at the conciliation stage, the council or the CCMA, whichever is applicable, may then be requested to resolve the dispute through arbitration.

- 2.11.9 Parties falling within the registered scope of a council do not have a choice between the council and the CCMA. Subject to the exceptional circumstances referred to below, if a council has jurisdiction the matter must be referred to such council and the CCMA does not have jurisdiction to deal with the matter. However, all the parties to the dispute must fall within the registered scope of the particular council and must fall only within the registered scope of that council and no other council, otherwise section 147

(4) applies and the CCMA has exclusive jurisdiction in respect of the dispute.²⁵

- 2.11.10 In exceptional circumstances, the parties to a dispute might not know that they fall within the registered scope of a council, or at least the referring party might not know that. The matter may pass through the CCMA's screening process without this being detected and at the time that it is discovered, a conciliation meeting might already have been arranged. The matter might even have passed through the conciliation stage without it being discovered that a council has jurisdiction and an arbitration hearing might have been arranged. In such circumstances the provisions of section 147 (2) or (3) would apply and the CCMA a discretion whether to -
- refer the dispute to the council for resolution; or to
 - appoint a commissioner, or if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of the LRA.
- 2.11.11 There is a distinction between the situation where a party refers a dispute to the CCMA full knowledge that a council has jurisdiction and a situation where it is only brought to the attention of the referring party, after a referral to the CCMA that a council has jurisdiction.
- 2.11.12 Where a party refers a dispute to the CCMA with full knowledge that a council has jurisdiction, neither section 147(2) nor (3) would apply and a commissioner dealing with the matter should merely make a ruling that the CCMA does not have jurisdiction. This would, for example, apply where an employer party to a dismissal dispute has complied with Item 4 (3) of the Code of Good Practice: Dismissal, and has informed the employee party that any dispute about the fairness of the dismissal should be referred to the relevant council. Should the CCMA make a ruling that it has no jurisdiction on these grounds, a referring party, desiring to pursue the matter will have no other choice but to start afresh and to refer the matter to the council with jurisdiction. If necessary, an application for condonation of a late referral will have to be made.
- 2.11.13 Where the referring party was unaware that a council had jurisdiction and the CCMA commissioner dealing with the matter exercises the discretion conferred by section 147(2) or 147(3) against resolution of the dispute by the CCMA, care should be taken to deal with the matter appropriately. To merely make a finding that the CCMA does not have jurisdiction would be irregular and in conflict with the provisions of the said sections. In such circumstances-

²⁵ Section 147 (4) provides that if a dispute has been referred to the CCMA and not all the parties to the dispute fall within the registered scope of a council or fall within the registered scope of two or more councils, the CCMA has exclusive jurisdiction to resolve the dispute

- the CCMA commissioner dealing with the matter should indicate in the ruling that the discretion was exercised to refer the matter to the appropriate council for resolution;
- the parties as well as the council should be notified of the ruling; and
- a copy of the referral document and the CCMA's decision or the commissioner's ruling should be forwarded to the council.

In such event the date of referral of the dispute to the council is, in terms of section 147 (7), deemed to be the date on which the referring party referred the dispute to the CCMA and if that was done timeously, there would be no need to apply to the council for condonation of a late referral.

2.11.14 Generally a council would have jurisdiction to resolve disputes between parties to the council to the extent that such disputes are specified in the constitution. Constitutions provide at least for dispute resolution in respect of the disputes that the LRA requires a council to resolve but some constitutions provide that a wider range of disputes between parties to the council be resolved in accordance with the procedure set out in the constitution.

2.11.15 Councils would normally be accredited to perform a conciliation and/or arbitration function in respect of the disputes involving non-parties falling within the registered scope of the council, if such function is specifically required to be performed by such council in terms of the LRA and BCEA, i.e. in respect of the following –

- matters of mutual interest (conciliation only)²⁶;
- dismissal disputes where an employee was dismissed by reason of operational requirements following a consultation procedure that applied to that employee only or more or where the employer employs less than ten employees, irrespective of the number of employees who are dismissed and where the employee has elected that the dispute be arbitrated²⁷ (conciliation and arbitration);
- dismissal disputes in respect of which the employee has alleged that the reason for the dismissal related to conduct or capacity (excluding participation in an unprotected strike) (conciliation and arbitration)²⁸;
- constructive dismissal disputes (conciliation and arbitration);
- dismissal disputes where the employee does not know the reason for the dismissal (conciliation and arbitration);

²⁶ Section 51 (3) read with sections 51 (1) and 51 (2) (b)

²⁷ Section 51 (3) read with section 191 (12)

²⁸ Section 191 (4) read with section 191 (5)

- unfair labour practice disputes (conciliation and arbitration);

2.11.16 Councils are not accredited to perform a dispute resolution function in respect of the following disputes -

LRA

- disputes about disclosure of information (section 16);
- disputes about organisational rights (sections 21 and 22);
- disputes about the interpretation or application of collective agreements where the collective agreement does not provide for arbitration by the bargaining council (sections 24 (2) to (5));
- disputes about agency shop and closed shop agreements (sections 24 (6) and 26 (11));
- disputes about determinations made by the Minister in respect of proposals made by statutory councils (section 45);
- disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled (sections 61(5) to (8));
- disputes about the demarcation of sectors and areas of councils (section 62);
- disputes about the interpretation or application of Parts A and C to F to Chapter III dealing with organisational rights, bargaining councils, public service bargaining councils, statutory councils and general provisions relating to bargaining councils unless the dispute has arisen in the course of arbitration proceedings under the auspices of the council (section 63);
- disputes concerning pickets (sections 69 (8) to (10));
- disputes about proposals that are the subject of joint decision making in workplace forums unless an agreed procedure provides for arbitration under the auspices of the bargaining council (section 86);
- disputes about disclosure of information to workplace forums (section 89);
- disputes about the interpretation or application of the provisions of Chapter V dealing with workplace forums (section 94).

BCEA

- matters in respect of which the Labour Court enjoys exclusive jurisdiction in terms of the BCEA (section 77);

- disputes about the interpretation or application of part C of Chapter 10 dealing with discrimination against employees exercising rights referred to in that part (section 88).

EMPLOYMENT EQUITY ACT

- disputes about unfair discrimination (section 10);
- disputes about interpretation and application of the Part on protection of employees' rights (section 52);
- disputes about disclosure of information needed for consultation regarding affirmative action (section 18);
- disputes about the interpretation or application of the Act (section 49);
- disputes about the interpretation or application of Part C relating to the protection of employee rights (section 52).

SKILLS DEVELOPMENT ACT

- disputes about learnerships (section 19);
- disputes about conditions of funding and any provision of Chapter 5 dealing with skills programmes (section 21);
- disputes about matters arising from the Act (section 31).

2.12 If parties have agreed in a collective agreement to refer the disputes about the interpretation or application of the collective agreement for resolution in terms of the procedure provided for in the agreement, what are the CCMA's powers if such disputes are subsequently referred to it?

- In terms of section 24 (1) every collective agreement must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement and such procedure must provide for conciliation and, if required, arbitration. The CCMA has jurisdiction only if the collective agreement does not provide for a dispute resolution procedure and/or the dispute resolution procedure in the collective agreement is not operative and /or any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

It follows that the CCMA may in such circumstances conciliate, and if required, arbitrate disputes about the interpretation or application of such collective agreements.

2.13 If parties have agreed in a private agreement that disputes between them ought to be resolved through private dispute resolution, what are the CCMA's powers if such disputes are subsequently referred to it?

2.13.1 A party to a private agreement may waive the right to refer disputes to the CCMA in terms of the LRA and may elect to refer such disputes to a particular person or body for resolution. If that has happened and such party subsequently refers such disputes to the CCMA, it would not have jurisdiction to perform a dispute resolution function and a ruling must be made that the CCMA does not have jurisdiction.

2.13.2 If it only becomes apparent after a dispute has been referred to the CCMA that the dispute ought to be resolved through private dispute resolution in terms of a private agreement between the parties, the CCMA has discretion in terms of section 147 (6) of the LRA to refer the dispute to the appropriate person or body for resolution in terms of the private agreement or to appoint a commissioner to resolve the dispute in terms of the LRA.

2.14 Where applicable what should be taken into account in exercising a discretion whether the CCMA should continue to resolve the dispute or whether the dispute should be referred to the appropriate person, bargaining council or other body with jurisdiction?

2.14.1 Commissioners should be guided by the purpose of the LRA, which implies that disputes should be resolved in the quickest and most effective way. Therefore if it would expedite the resolution of a dispute should the CCMA continue to resolve it, that would weigh in favour of making a ruling that the CCMA must continue to resolve the dispute. This would, for example, be the case if it is only discovered during a very late stage of an arbitration hearing that a council has jurisdiction. On the other hand if an arbitration is not part heard and is in any event going to be adjourned, it may well be appropriate to refer the matter to the appropriate person, council or other body with jurisdiction.

2.14.2 The views of the parties should be carefully considered particularly if they or one of them object to the CCMA continuing to resolve the dispute and reasons must be given for not upholding such objection.

2.15 What are the procedural requirements for each process and what relief may be awarded?

2.15.1 The procedural requirements for each process and the relief that may be granted are dealt with in the Chapter dealing with such process.

2.15.2 Generally the relief that may be awarded in arbitrations are set out in section 193 of the LRA. In arbitrations about unfair dismissal, the relief that may be awarded is re-instatement, re-employment or compensation. In arbitrations relating to unfair labour practices the dispute may be determined on terms that the arbitrator deems reasonable which may include ordering re-

instatement, re-employment or compensation. In addition a commissioner may make an award²⁹ -

- that gives effect to any collective agreement;
- that gives effect to the provisions and primary objects of the LRA;
- that includes, or is in the form of, a declaratory order.
- that includes an order for costs

In unfair discrimination arbitrations the appropriate remedy may be:

- payment of just and equitable compensation (for breach of the right to dignity and equality, and the right not to be discriminated against) – there is no cap;
- payment of damages (actual patrimonial loss, which must be proved) that does not exceed the amount stated in the determination made by the Minister in terms of section 6 (3) of BCEA;
- an order directing the employer to take steps to prevent the same unfair discrimination or a similar practise from occurring in respect of other employees.

Chapter 3 Notice and Service

Contents

- 3.1 What is the purpose of giving notice?
- 3.2 How is notice to be effected?
- 3.3 How must a party serve documents?
- 3.4 How can a party prove that a document was served?
- 3.5 How to file documents with the CCMA?
- 3.6 How may the CCMA give notice of a set down?
- 3.7 How should the prescribed notice periods be calculated?
- 3.8 What notice must be given of a conciliation hearing?
- 3.9 What notice must be given of a con-arb hearing?
- 3.10 What notice must be given of an arbitration hearing?
- 3.11 What notice must be given of an inquiry by arbitrator?
- 3.12 Within what time period must notice be given of an inquiry by arbitrator?
- 3.13 What notice must be given of application hearings, such as, condonation, joinder, substitution, variation, rescission or postponement?
- 3.14 What is the effect of short notice?

3.1 What is the purpose of giving notice?

- 3.1.1 The purpose of giving notice of a referral, a request for arbitration or an application, as the case may be, is -
 - to make the other party/ parties aware that the referral or the request is to be made or that an application is to be brought;
 - to make the other party/parties aware of the nature of the dispute that is being referred or in respect of which the request for arbitration is being made or the nature of the application that is being brought;
 - to make the other party/parties aware of the relief sought and the grounds on which such relief is sought; and

- in the case of applications, to make the other party/parties aware of the steps to be taken should they wish to oppose the matter.

3.1.2 The purpose of the CCMA giving notice of set down to the parties is-

- to make them aware of the date, time and venue for the conciliation or arbitration or other process;
- to enable them to ensure that they and/or their representatives attend the process;
- to enable them to prepare for the process; and
- where applicable, to arrange for their witnesses to be present.

3.2 **How is notice to be effected?**

3.2.1 In the case of a referral of a dispute the other party/parties are notified of it by the referring party serving the prescribed referral document (Form LRA 7.11) on them.

3.2.2 In the case of a request for arbitration the other party/parties are notified of it by the applicant party serving the prescribed request document (Form LRA 7.13) on them.

3.2.3 In the case of an application the other party/parties are notified of it by the applicant party serving the notice of application including the founding affidavit on them.

3.2.4 The CCMA gives notice of a set down by informing the parties of the date, time and venue for the process.

3.3 **How must a party serve documents?**

3.3.1 The CCMA Rules require that service be effected in one or more of the prescribed manners.¹ It is the obligation of the referring party to ensure that service was properly effected.

In terms of the applicable employment law the CCMA is required to provide administrative support to employees who earn below the BCEA threshold.

3.3.2 A party may serve a document on the other parties by **handing a copy** of the document to² -

- the person concerned;

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¹ Rule 5

² Rule 5(1)(a)

- a representative authorised in writing to accept service on behalf of the person;
- a person who appears to be at least 16 years old and in charge of the person's place of residence, business or place of employment premises at the time; or
- a person identified in rule 5 (2).

3.3.3 A document may also be served by **leaving a copy** of the document at³ -

- an address chosen by the person to receive service; or
- premises as envisaged by and in accordance with Rule 5 (3).

3.3.4 Service may also be effected by emailing, **faxing or telexing** a copy of the document to the person's email, fax or telex number respectively, or an email address, fax or telefax number, chosen by that person to receive service⁴.

3.3.5 It is further permissible to effect service by sending a copy of the document by **registered post or telegram** to the last-known address of the party or an address chosen by the party to receive service⁵.

3.3.6 A document may also be served⁶ -

- on a company or other body corporate by handing a copy of the document to a responsible employee of the company or body corporate, at its registered office, its principal place of business within the Republic or its main place of business within the magisterial district in which the dispute first arose;
- on an employer by handing a copy of the document to a responsible employee of the employer at the workplace where the employee(s) involved in the dispute ordinarily work or worked;
- on a trade union or employers' organisation by handing a copy of the document to a responsible employee or official at the main office of the union or employers' organisation or its office in the magisterial district in which the dispute arose;
- on a partnership, firm or association by handing a copy of the document to a responsible employee or official at the place of business of the partnership, firm or association or, if it has no place of business, by serving a copy of the document on a partner, the owner of the firm or the chairman

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³ Rule 5(1)(b)

⁴ Rule 5(1)(c)

⁵ Rule 5(1)(d)

⁶ Rule 5(2)

or secretary of the managing or other controlling body of the association, as the case may be;

- on a municipality, by serving a copy of the document on the municipal manager or any person acting on behalf of that person;
- on a statutory body, by handing a copy to the secretary or similar officer or member of the board or committee of that body, or any person acting on behalf of that body;
- on the State or a province, a state department or a provincial department, a minister, premier or a member of the executive committee of a province by handing a copy to a responsible employee at the head office of the party or to a responsible employee at any office of the State Attorney.

3.3.7 If no person identified in rule 5 (2) is willing to accept service, service may be effected by affixing a copy of the document to⁷ -

- the main door of the premises concerned; or
- if this is not accessible, a post-box or other place to which the public has access.

3.3.8 The CCMA or a commissioner may order service in a manner other than prescribed in Rule 5⁸.

3.4 How can a party prove that a document was served⁹?

3.4.1 A party must prove to the CCMA or a commissioner that a document was served in accordance with the rules, by providing the CCMA or a commissioner –

- with a copy of proof of mailing the document by registered post to the other party;
- with a copy of the telegram or telex communicating the document to the other party;
- with a copy of the telefax transmission report indicating the successful transmission to the other party of the whole document; or

3.4.2 If a document was served by hand, a party may prove that a document was served by providing the CCMA or a commissioner –

⁷ Rule 5(3)

⁸ Rule 5(4)

⁹ Rule 6

- with a copy of a receipt signed by, or on behalf of, the other party clearly indicating the name and designation of the recipient and the place, time and date of service; or
 - with a statement confirming service signed by the person who delivered a copy of the document to the other party or left it at any premises.
- 3.4.3 If a document was served by email a party may prove that a document was served by providing the CCMA or a commissioner with a copy of the sent email indicating the successful dispatch of the email accompanied by an affidavit of the person who effected service as proof that it was sent to the correct email address and that it was sent to the other party.
- 3.4.4 If proof of service in accordance with the above is provided, it is presumed, until the contrary is proved, that the party on whom it was served has knowledge of the contents of the document. The relevant provisions of the Electronic Communications and Transactions Act No 25 of 2002 are applicable in respect of any issue concerning service by email.
- 3.4.5 The CCMA may accept proof of service in a manner other than that prescribed in the rules, as sufficient.

3.5 How to file documents with the CCMA¹⁰?

3.5.1 Documents must be filed-

- by handing the document to the regional office of the registrar at the address listed in Schedule One to the rules;
- by sending a copy of the document by registered post to the regional office of the registrar at the address listed in Schedule One;
- by faxing or emailing the document to the regional office or an office of the Department of Labour at a number or email address listed in Schedule One to the rules. Documents filed by means of email must be transmitted in a format that is compatible with software used by the Commission.

3.5.2 A document is filed with the CCMA when –

- the document is handed to the regional office of the registrar;
- a document sent by registered post is received by the regional office of the registrar;
- the transmission of a fax is completed; or

- the email is received in the regional office or an office of the Department of Labour listed in Schedule One.

3.5.3 A party must only file the original of a document if requested to do so by the CCMA or a commissioner. A party must comply with a request to file an original document within seven days of the request.

3.6 How may CCMA give notice of a set down?

3.6.1 The CCMA may provide notice of a conciliation or arbitration hearing, or any other proceeding before it, by means of any of the methods prescribed for service in these Rules as well as by means of short message services (SMS)¹¹.

3.6.2 The CCMA may notify parties of the set down of a process -

- by handing the notice of set down to the party concerned or to the authorised representative of such party;
- by sending the notice of set down by registered post to the correct address of the party concerned or to an address elected by the party for the purpose of service; provided that if an address was elected for purpose of service then the notice of set down must be sent to such address;
- by faxing the notice of set down to the correct fax number of the party concerned; or
- by sending the notice of set down by email to the correct e-mail address of the party concerned.

3.6.3 If a notice of set down is handed to a party or a representative of a party, the person receiving the notice of set down must acknowledge receipt thereof in writing and the written acknowledgement must be placed in the relevant file as proof that the notice of set down was received by the said party. Such written acknowledgement would constitute sufficient proof that the party received the notice of set down and it would not be necessary to take further steps to notify the party of the set down.

3.6.4 In respect of conciliations, it is permissible to send a notice of set down to a party by ordinary mail.

3.6.5 In the case of arbitrations it is practice to send the notice of set down by registered post or to fax it to the parties so that documentary proof that it was done can be placed in the file.

- 3.6.6 If the notice of set down was sent by registered post or if it was faxed to the parties, proof of sending it by registered post or of faxing it, as the case may be, must be placed in the relevant file.
- 3.6.7 Besides the manner in which the written notice of set down is given, the CCMA adopts further measures to remind parties of the set down and to ensure that the parties are aware of the set down of conciliations and arbitrations, by phoning them or sending them a sms when it is possible to do so. This is done as a matter of courtesy and parties do not have a right to be phoned or to be sent a sms. However, if a party was phoned or if a sms was sent to a party, evidence about it may be used to prove that the party was aware of the set down.
- 3.6.8 If a party was telephonically reminded of the set down, a note confirming that such reminder was given, indicating the identity of the person who was reminded, must be placed in the relevant file.
- 3.6.9 If a party was reminded by sms, a note confirming that it was done must be placed in the file.
- 3.6.10 If a party was reminded by e-mail a copy of the e-mail must be placed in the file.

3.7 How should the prescribed notice periods be calculated¹²?

- 3.7.1 For the purpose of calculating a prescribed period, "day" means a calendar day.
- 3.7.2 The notice period must be calculated from the day on which the parties are notified of the hearing by the CCMA. To calculate the notice period and to allow for the full notice period before the specified day of the hearing, the first day is excluded (this refers to the day that the parties are notified) and the last day is included. If the last day of the notice period falls on a Saturday, Sunday or public holiday, that last day must be excluded. If the last day of the notice period falls on a day during the period between 16 December to 7 January, the notice period will expire on 8 January.
- 3.7.3 If the CCMA gives notice by registered post it is presumed that notice sent by registered post by the CCMA, has been received by the person to whom it was sent, 7 days after it was posted. In the absence of proof to the contrary, the computation of the notice period will be reckoned from the 8th day after the notice was dispatched by registered post, which day will be deemed as the day on which the party has received the notice. Calculating the 7 days then means that both the day of posting and the last day are excluded to provide for the full 7-day period. The presumption will thus operate on the 8th day, unless this day falls on a Saturday, Sunday or public holiday or on a day within the exclusionary period.

3.8 What notice must be given of a conciliation hearing?

- 3.8.1 The CCMA must give the parties at least 14 days notice in writing of a conciliation hearing, unless the parties agree to a shorter period of notice¹³. The 14 days runs from the date the notification is sent by the CCMA. If sent by registered post an additional 7 days must be allowed.

3.9 What notice must be given of a con-arb hearing?

- 3.9.1 The CCMA must give the parties at least 14 days notice in writing of a con-arb hearing, unless the parties agree to a shorter period of notice¹⁴. The 14 days runs from the date the notification is sent by the CCMA. If sent by registered post an additional 7 days must be allowed.

3.10 What notice must be given of an arbitration hearing?

- 3.10.1 The CCMA must give the parties at least 21 days notice, in writing, of an arbitration hearing, unless the parties agree to a shorter period¹⁵. This period applies to part heard arbitrations as well. The 21 days runs from the date the notification is sent by the CCMA. If sent by registered post an additional 7 days must be allowed.

3.11 What notice must be given of an inquiry by arbitrator?

- 3.11.1 At least 7 days notice must be given of an inquiry by arbitrator hearing unless otherwise agreed¹⁶.

3.12 Within what time period must notice be given of an inquiry by arbitrator?

- 3.12.1 Within 7 days of receiving the request for an inquiry by arbitrator and payment of the prescribed fee¹⁷.

3.13 What notice must be given of application hearings, such as, condonation, joinder, substitution, variation, rescission or postponement?

- 3.13.1 Unlike the provisions relating to the set down of conciliation, con-arb and arbitration hearings, no provision is made for any notice period for hearing applications for condonation, joinder, substitution, variation or rescission etc. Reasonable notice must be given.

3.14 What is the effect of short notice?

¹³ Rule 11

¹⁴ Rule 17

¹⁵ Rule 21

¹⁶ Rule 34(5)

¹⁷ Rule 34 (4)

- 3.14.1 If the CCMA were to give short notice, such defect can be cured if the parties agree to a shorter period of notice. The parties' participation in the conciliation or arbitration proceedings without objection may be construed as an agreement to short notice. However, in the absence of such agreement, the short notice will not be cured and must be treated as a nullity. This means the aggrieved party can object to the short notice on the day of the conciliation or arbitration hearing. If a party ignorantly or deliberately fails or refrains from raising an objection on the date of the hearing, that party cannot challenge the short notice at a later stage¹⁸.
- 3.14.2 If a party was not given sufficient notice of a hearing, and does not attend the hearing or attends but objects to the short notice, the hearing must be postponed so that such party can be given proper notice. In the case of conciliations, a certificate of non-resolution must be issued if the dispute still remains unresolved 30 days after the date on which the referral was filed with the CCMA.

Chapter 4: Representation

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- 4.1 What are the statutory provisions and the rules governing the right to representation?
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- 4.12 May a representative represent a party in the absence of such party?
- 4.13 What should conciliators do when a dispute remains unresolved at the end of conciliation in order to prevent delays at arbitration brought about by applications for legal representation to be allowed?
- 4.14 What should commissioners do when a dispute remains unresolved at the end of a conciliation forming part of a con-arb where the arbitration is to be adjourned, in order to prevent delays at arbitration brought about by applications for legal representation to be allowed?

4.1 What are the statutory provisions and the rules governing the right to representation?

- 4.1.1 The LRA contains provisions governing the right to representation in the CCMA's processes insofar as it concerns the right of registered trade unions and employers' organisations to represent their members but does not regulate the right of legal practitioners to represent parties in CCMA's processes. The LRA however authorised the Governing Body of the CCMA to make rules regulating the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings and to give further content to the right of registered unions and employers' organisations to represent their members¹. The rules give content to the provisions of the LRA and draw a distinction between conciliations on the one hand and con-arbs and arbitrations on the other hand. The rules further draw a distinction as far as con-arbs and arbitrations are concerned between unfair dismissal disputes involving allegations that the reason for dismissal related to conduct or capacity on the one hand and other disputes on the other hand.
- 4.1.2 Section 200 of the LRA provides that a registered trade union or employers' organisation may be a party to and/or may act in any one or more of the following capacities in any dispute to which any of its members is a party –
- in its own interest;
 - on behalf of any of its members;
 - in the interest of any of its members.
- 4.1.3 Rule 25(1) (a) and (b) regulate the right to representation in conciliation and arbitration proceedings respectively. Please see Rule 25 of the CCMA rules
- 4.1.4 Rule 25(1)(c) provides that if the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, a party, despite sub-rule 25(1)(b), is not entitled to be represented by a legal practitioner . Please see rule 25 (1) (c).
- 4.1.5 Rule 4 regulates the right to representation when signing documents required to be signed in terms of the LRA or the rules and provides that such documents may be signed by the party or by a person entitled in terms of the LRA or the rules to represent the party in the proceedings. In terms of Rule 4(2), if proceedings are jointly instituted or opposed by employees, documents may be signed by an employee who is mandated by the other employees to sign documents, provided that a written list of the employees who have mandated the employee to sign on their behalf, must be attached to the referral document.²

¹ Section 115 (2A) (k) as amended

² This must be interpreted as meaning that such a list must be attached to the relevant document such as a referral document or, for example, a notice of opposition in an application

4.2 Who may represent a party in any process involving any dispute?

In any dispute and in any process –

- 4.2.1 a party may be represented by an official or office bearer of that party's registered trade union or employers' organisation;
- 4.2.2 an employer party may be represented by an employee of such party;
- 4.2.3 an employer party may be represented by a director if a company and by a member if a close corporation;
- 4.2.4 parties who are still minors i.e. less than 18 years old, may be represented by their legal guardians.

4.3 Who may not represent a party at all?

- 4.3.1 An employee party may not be represented by a fellow employee, unless such fellow employee is a member, official or office bearer of that employee party's registered trade union (except in the respect referred to in rule 4 dealt with in paragraph 4.1.7 above).
- 4.3.2 Relatives or friends of a party may not represent such party unless they qualify on a basis permitted by the rules, save that minors may be represented by their legal guardians.
- 4.3.3 A labour consultant or business associate may not represent any party unless they qualify on a basis permitted by the rules.³
- 4.3.4 A legal practitioner may not represent any party during conciliation including the conciliation part of a con-arb.

4.4 In what processes may a party be represented by a legal practitioner?

- 4.4.1 A party may as of right be represented by a legal practitioner in any arbitration including the arbitration part of a con-arb, if the process does not relate to an unfair dismissal dispute in which a party has alleged that the reason for the dismissal related to conduct or capacity. Disputes in respect of which a party is, as of right, entitled to legal representation include disputes in respect of which the Labour Court has jurisdiction but the parties consented to arbitration by the CCMA⁴, as well as disputes about –

- the interpretation or application of collective agreements;

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³ A commissioner has no discretion to allow a party to be represented by a labour consultant. See *SOM Garments (Pty) Ltd v Van Dokkum & others* [1997] 9 BLLR 1234 (LC) and *Labuschagne v WP Construction* [1997] 9 BLLR 1251 (CCMA)

⁴ As may, for example, be done in disputes involving automatically unfair dismissals, dismissal for operational requirements involving 10 or more employees, dismissal for participation in an unprotected strike, dismissal as a result of a closed shop agreement and unfair discrimination (as envisaged by the EEA)

- organisational rights;
 - unfair dismissal for operational requirements in respect of which the CCMA has jurisdiction;
 - constructive dismissal;
 - unfair dismissal where the employee party does not know the reason for dismissal and the employer party has not alleged that the reason relates to conduct or capacity;
 - unfair labour practices;
 - demarcations; and
 - entitlement to severance pay.
 - unfair discrimination; and
 - interpretation and application of the part dealing with the protections of employees.
- 4.4.2 A party may be represented by a legal practitioner in an arbitration including the arbitration part of a con-arb relating to an unfair dismissal dispute where a party (i.e. any party) has alleged that the reason for the dismissal related to conduct or capacity but only if –
- the commissioner and all the other parties consent; or
 - the commissioner made a ruling that it is unreasonable to expect a party to deal with the dispute without legal representation after considering (a) the nature of the questions of law raised by the dispute; (b) the complexity of the dispute; (c) the public interest; and (d) the comparative ability of the opposing parties or their representatives to deal with the dispute.
- 4.4.3 Some employer parties, employers' organisations and unions employ persons who are entitled to practise as legal practitioners so that they can appear for them as employees at the CCMA during conciliations and arbitrations of the nature referred to in the preceding paragraph. Such representatives should be treated in the same way as legal practitioners and not as employees. They should be excluded from conciliations and required to apply for legal representation to be allowed in cases where it would have been necessary for a legal practitioner to make such application.⁵

4.4.4 It is practice to allow legal practitioners to represent parties in applications dealing with jurisdictional objections, condonation of late referrals, and rescission of rulings and awards, irrespective of the nature of the underlying dispute.

4.5 What procedure should parties follow in applying for legal representation to be allowed?

4.5.1 Parties who desire that legal representation be allowed should first seek the consent of the other party, preferably in writing. The grounds on which the consent was sought and granted must be specified. Once such consent has been obtained, the consent of the commissioner should also be sought. Should all parties consent that legal representation be allowed, a commissioner must consider the grounds on which the agreement is based and should exercise a discretion whether to grant consent. Should the other party/parties as well as the commissioner consent that legal representation be allowed, there is no need to bring a formal application or to make further representations.

4.5.2 In cases where the arbitration hearing does not proceed immediately after the conciliation process, a party may request the commissioner dealing with the matter to facilitate an agreement between the parties regarding whether or not legal representation should be allowed. Should the parties reach an agreement regarding legal representation, the commissioner should be requested to record the agreement in writing and such written agreement should then be signed by all parties. The grounds which led them to consent to legal representation should be specified in the agreement. This agreement should be placed before the arbitrator with a view of obtaining his/her consent.

4.5.3 An application that legal representation be allowed (where required), is a preliminary application of the nature envisaged in rule 31(1) (c) and therefore the bringing of such application is regulated by the provisions of rule 31 dealing with applications generally.⁶

4.5.4 As far as applications for legal representation to be allowed are concerned, the practice is not to require strict compliance with the provisions of rule 31, particularly in cases where a notice of set down has already been sent to the parties and where it is not possible to allow the time prescribed in rule 31 for filing of notices of opposition and replying affidavits. Parties may also brief a legal practitioner shortly before the arbitration hearing rendering it impossible to allow the prescribed time for notices of opposition and replying affidavits. In order to facilitate the speedy resolution of disputes, the practice is to allow even oral representations in support of such applications to be made at the commencement of an arbitration and for an arbitrator to make a ruling based on such oral representations as permitted by rule 31(10).

- 4.5.5 Notwithstanding the practice referred to in the preceding paragraph, parties should as far as possible comply with the provisions of rule 31, as the giving of notice that an application will be brought and the filing of affidavits (or even written statements), may eliminate the need for elaborate oral representations on the day of the hearing, which in turn may facilitate a speedy ruling on the application, thereby increasing the likelihood that the arbitration hearing may be concluded on the day.
- 4.5.6 In their affidavits, statements or representations (as the case may be), parties should deal with the grounds on which it is alleged that it would be unreasonable to expect a party to deal with the dispute without legal representation and, in particular, with the factors that a commissioner must consider before making a ruling, i.e. –
- the nature of the questions of law raised by the dispute;
 - the complexity of the dispute;
 - the public interest; and
 - the comparative ability of the opposing parties or their representatives to deal with the dispute.
- 4.5.7 Parties seeking a ruling that legal representation be allowed should not anticipate that legal representation will be allowed and must prepare for arbitration so as to be able to proceed if legal representation is not allowed. Likewise parties opposing an application that legal representation be allowed should not anticipate that legal representation will not be allowed and must prepare for the arbitration so as to be able to proceed with the arbitration if legal representation is allowed. If they would themselves require legal representation, if the other party is allowed legal representation, they should arrange for their legal representative to be available in the event that legal representation is allowed.
- 4.5.8 In appropriate circumstances a party or the parties may request that the application for legal representation to be allowed, be set down for hearing prior to the day on which the arbitration hearing is to be held, in order to obtain certainty in advance, whether or not legal representation will be allowed. For example, if the arbitration is to be adjourned for other reasons, parties may and should request that the time initially allocated for the arbitration hearing, be used to argue preliminary issues, such as, whether legal representation should be allowed.
- 4.6 **What are the duties and responsibilities of CCMA staff in dealing with applications for legal representation to be allowed?**

- 4.6.1 CCMA staff and in particular commissioners dealing with conciliations and arbitrations should advise parties of their rights regarding legal representation. Arbitrators have a duty to do so.⁷
- 4.6.2 Whenever parties seek advice as to how to go about applying for legal representation to be allowed the CCMA staff should advise them of the procedure outlined above.
- 4.6.3 Where all parties to a dispute consent to legal representation, the relevant commissioner should be approached through his/her CMO to seek his/her consent and the written consent signed by both parties, including the grounds on which they consented, should be placed before the commissioner. Should the commissioner also consent to legal representation being allowed, he/she should also sign the consent document. The original of the consent document should be placed in the relevant file and copies thereof should be sent /faxed to all parties. In the event that the commissioner refuses to grant consent, he/she should give reasons for his/her refusal. The reasons must be placed in the file and copies thereof must be sent/faxed to all parties so that the party/parties may know that there is a need for a formal application that legal representation be allowed.
- 4.6.4 Should a written application for legal representation be received, it must be placed before the CSC or his/her delegate for a decision as to how the application should be determined. The CSC or his/her delegate may, *inter alia*, direct that the application be heard at the commencement of the arbitration or at some time prior to that. The application must thereafter be determined in accordance with such directive.
- 4.6.5 If the ruling is made on a day prior to the commencement of the arbitration, it should be in writing and copies of it should be sent /faxed to the parties. If the ruling is made at the commencement of the arbitration it is sufficient for the reasons and the ruling to be recorded as part of the recording of the whole process.
- 4.7 **What should a commissioner consider in deciding whether to consent to legal representation where all parties consent to it?**
- 4.7.1 A commissioner must exercise the discretion judicially after considering the factors in paragraph 4.5.6 above, as well as the grounds on which the parties consented to legal representation.⁸
- 4.8 **What should a commissioner consider in deciding whether to allow legal representation where one party does not consent to legal representation?**

⁷ *Scholtz v Maseko NO & others* [2000] 9 [BLLR] 1111 (LC)

⁸ *Colyer v Essack NO & others; Malan v CCMA & another* [1997] 9 BLLR 843 at 1176 and *Tiger Brand Field Services v CCMA and others* [2006] 7 BLLR 694 (LC) at par 57

- 4.8.1 The central issue is whether it would be unreasonable to expect a party to deal with the dispute without legal representation and the factors mentioned in the rules and referred to in paragraph 4.5.6 above, should be considered in coming to a conclusion on the said central issue.⁹
- 4.8.2 The rules do not indicate what weight should be attached to each of the four factors and commissioners have a discretion as to the weight to be attached to each factor.
- 4.8.3 In respect of the **nature of the questions of law** raised by the dispute it is relevant to consider-
- whether there are any questions of law that need to be decided; and
 - whether the questions of law are such that a party cannot reasonably be expected to deal with such questions without legal representation.

The more difficult the questions of law are, the more a commissioner should lean in favour of allowing legal representation. If there are conflicting arbitration awards or Labour Court judgments on such questions of law, commissioners should generally rule in favour of allowing legal representation. Some questions of law have not been clearly decided, e.g. to what extent hearsay evidence should be allowed or what needs to be proved before evidence of polygraph tests would become admissible and in respect of such questions it may well be unreasonable to expect a party to deal with it without legal representation.

- 4.8.4 In deciding whether a matter is so **complex** that it is unreasonable to expect a party to deal with it without legal representation, a number of factors need to be taken into account, e.g.-
- whether evidence of a technical nature needs to be led;
 - whether it is relevant to hear evidence of a long history;
 - whether the circumstances giving rise to the dispute are complex;
 - the number of witnesses to be called and the extent to which versions of different witnesses are required to be put under cross-examination;
 - the expected duration of the hearing; and
 - the extent to which the commissioner would be able to assist the parties to lead their evidence and to ensure that versions are put during cross-examination.

⁹ *Afrox Ltd v Laka & others* [1999] 5 BLLR 467 (LC) at 471-2; *Commuter Handling Services (Pty) Ltd v Mokoena & others* [2002] 9 BLLR 843 (LC) at 848; and *Vaal Toyota (Nigel) v MIBCO and others* [2002] 10 BLLR 936 (LAC) at 943

- 4.8.5 The **public policy** that needs to be considered is basically the purpose behind the rules limiting the right to legal representation. The perception was that lawyers make an arbitration process legalistic and expensive and that they are responsible for delaying the proceedings due to their unavailability and the approaches that they adopt.¹⁰ Evidence may be placed before a commissioner that the particular legal representative would not adopt a legalistic approach, that he/she would readily be available and that the assistance of a legal representative would shorten the proceedings and render it less expensive. Such evidence may cause a commissioner to attach less weight to the public policy that led to the limitation on the right to legal representation. It is further relevant to consider that public policy requires that a party be afforded the right to legal representation in complex cases that may have dire consequences for the party concerned and this may lead to a commissioner attaching more weight to the other factors. Public policy further requires that a commissioner should not create a perception of bias and when parties are unrepresented it is likely that a commissioner will be required to provide more assistance and this in turn increases the likelihood of perceptions of bias.
- 4.8.6 The **comparative ability** of the parties and/or their representatives to deal with the dispute is an important consideration. In this regard a commissioner should not only consider what the position would be if legal representation is not allowed but also what it would be should legal representation be allowed. Educational qualifications, relevant experience and the degree of sophistication are amongst the factors that should be considered. There is more pressure on an individual who is presenting his/her own case than there is on a representative of a party. The pressure may affect the ability of an individual presenting his/her own case, to deal with the dispute and this should also be taken into account.
- 4.8.7 The right to legal representation is acquired once a commissioner has concluded that it would be unreasonable to expect a party to deal with the dispute without legal representation. Once a commissioner has reached such conclusion he/she has no discretion and the party concerned becomes entitled to legal representation during the arbitration.¹¹

4.9 Who may represent parties in applications?

- 4.9.1 Interlocutory applications brought during the course of an arbitration, such as, applications for postponement, joinder, substitution and variation, should be seen as part of the arbitration process and the rules governing representation in arbitration processes apply equally to such applications.
- 4.9.2 Condonation applications, applications regarding jurisdictional objections, applications for legal representation to be allowed and applications for rescission are not part of an arbitration process and parties may be

¹⁰ Strydom v CCMA and others [2004] 10 BLLR 1032 (LC) at1038- 9

¹¹ See *Afrox Ltd v Laka & others supra*; *Commuter Handling Services (Pty) Ltd v Mokoena & others supra*; and *Vaal Toyota (Nigel) v MIBCO and others supra*

represented by any person who may generally represent them at the CCMA, provided that there is no limit on the right to legal representation.

4.10 What proof should commissioners require before allowing a representative to represent a party?

- 4.10.1 A commissioner who has been appointed, whether as conciliator in a con-arb or conciliation, or as arbitrator, has an obligation to determine whether the representative of a party qualifies to represent such party. This duty particularly arises when there is an objection raised by a party¹² or when the status of a particular representative is not known to the commissioner.
- 4.10.2 The commissioner should embark on a fact finding exercise in order to establish whether the representative has a right to appear in the process. In this regard the commissioner-
- may call upon the representative to present proof that he/she qualifies in terms of the LRA and the rules to represent the party;¹³ and
 - may require the representative to tender any documents, such as, constitutions, payslips, contracts of employment, documents and forms, recognition agreements, and proof of membership of a trade union or employers' organisation.¹⁴
- 4.10.3 In the case of sole proprietorships, companies or close corporations, whether a person is an employee may be established by presenting a written contract of employment or by oral evidence, if no such written contract exists. In the case of companies, directorship may be established with reference to a valid letterhead or documentary proof issued in terms of the Companies Act. Membership of a close corporation may be established with reference to a certified copy of form CK2 or CK2A.
- 4.10.4 In the case of trade unions and employer organisations, the registrar of labour relations keeps a register of all registered trade unions and employers' organisations and publishes notices in the government gazette regarding new entries and deletions.¹⁵ The CCMA informs commissioners of such entries and deletions and commissioners should not allow an official or office bearer to appear in any process if such organisation has never been registered or if such registration has been deleted and no re-registration has taken place.¹⁶
- 4.10.5 The commissioner making a determination regarding the status of a representative must require the person who is seeking to represent a party on the basis that he/she is an official or office bearer of a trade union or an employers' organisation, to establish each of the following -

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¹² Rule 25(2)

¹³ Rule 25(3)

¹⁴ Rule 25(4)

¹⁵ Section 109(2)

¹⁶ Section 111(5)

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

4.11 What procedure should be followed in making a ruling regarding representation?

- 4.11.1 The enquiry into the status of a representative should generally take place before the commencement of the particular process and if it only appears during the process that there is reason for such enquiry, then it must be done as soon as that is discovered.
- 4.11.2 If the enquiry is made at the instance of the commissioner or as a result of an objection at the commencement of a process, the commissioner must hear oral representations and where necessary, require documentary proof to be handed in. If there are serious factual disputes, the commissioner may hear evidence on such issues. If evidence was heard, the commissioner must allow an opportunity for oral argument at the conclusion of the hearing of evidence. If it is at all possible to do so an oral ruling must be made after the arguments, and reasons for the ruling must be given. If it is not possible to make an oral ruling the matter may stand down and a written ruling (with reasons) must be made as soon as possible. The whole of the proceedings, even if it takes place prior to conciliation, must be recorded.
- 4.11.3 If there is a formal application supported by affidavit the commissioner must consider the facts and submissions contained in such papers, as well as any answering affidavit or oral representations made in opposition to the application. If the application is made at the commencement of a process such as arbitration, the procedure referred to in the preceding paragraph should be followed.
- 4.11.4 The commissioner should not proceed with the proceedings until such time as the question of representation has been determined. In the event that the

person is unable to establish his/her right to represent a party in the proceedings, the person should not be allowed to assist such party during the proceedings as it would vitiate the whole of the proceedings.¹⁷

4.12 May a representative represent a party in the absence of such party?

- 4.12.1 A commissioner must allow a representative to participate in conciliation as well as arbitration proceedings even though the party so represented, fails to appear in person.¹⁸
- 4.12.2 Representatives may enter into settlement agreements on behalf of the parties that they represent if they are mandated to do so.
- 4.12.3 Representatives should be warned of the consequences of participating in arbitration in the absence of the party that they represent. The arbitration will be deemed to have continued in the presence of such party and it will not be possible to apply for rescission of an unfavourable award on the grounds envisaged by section 144 (a) of the LRA.

4.13 What should conciliators do when a dispute remains unresolved at the end of conciliation in order to prevent delays at arbitration brought about by applications for legal representation to be allowed?

- 4.13.1 In disputes where legal representation is not automatically allowed at arbitration, conciliating commissioners should attempt to secure an agreement between the parties regarding whether or not legal representation should be allowed at a subsequent arbitration.
- 4.13.2 Should the parties reach agreement it must be reduced to writing and signed by all the parties' whereafter each party must be given a copy of the agreement. The original agreement should be placed in the file so that the arbitrating commissioner can consider whether to consent to legal representation.
- 4.13.3 Should the parties fail to reach an agreement regarding legal representation, the conciliating commissioner must record this on the result sheet and advise the parties of their rights to apply for legal representation to be allowed and that the procedure envisaged by rule 31 should be followed i.e. that an application is required to be made.

4.14 What should commissioners do when a dispute remains unresolved at the end of a conciliation forming part of a con-arb where the arbitration is to be adjourned, in order to prevent delays at arbitration brought about by applications for legal representation to be allowed?

¹⁷ *SA Post Office Ltd v Govender & others* [2003] 8 BLLR 818 (LC)

¹⁸ Rule 13 is now silent on representation in the absence of a party. However 4.12 remains a practice in the Commission.

- 4.14.1 At the end of the conciliation part of such con-arbs, the arbitration should be commenced and the application for legal representation should be considered. The oral submissions of the parties should be recorded and a ruling should be made regarding whether or not legal representation is allowed, before adjourning the arbitration.

Chapter 5 - The referral of a dispute and initial administration

Contents

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- 5.10 Does the right to refer a dispute prescribe?
- 5.11 Must employee parties' wishing to pursue claims for statutory monies along with other disputes refer such claims by including it in Form 7.11?

5.1 What disputes may be referred to the CCMA for conciliation?

- 5.1.1 The disputes that may be referred to the CCMA for conciliation are the disputes referred to in paragraph 2.7 above.

5.2 Who may refer disputes for conciliation?

- 5.2.1 Any party that is specifically referred to in any section of the LRA or any other Act, in dealing with a particular employment matter, may refer a dispute to the CCMA for conciliation.
- 5.2.2 In general, the following parties may, depending on specific provisions of the LRA or any other Act, refer a dispute to the CCMA–
 - employees;

- registered trade unions;
 - employers;
 - registered employers' organisations;
 - workplace forums; and
 - statutory councils.
- 5.2.2 Only a dismissed employee may refer a dismissal dispute to the CCMA¹ and only an employee who has been dismissed for operational requirements may refer a severance pay dispute to the CCMA². Further, only an employee may refer an unfair labour practice dispute³ to the CCMA.
- 5.2.4 In terms of the EEA a job applicant or prospective employee may refer a dispute to the CCMA only where the dispute relates to freedom of association⁴ or discrimination⁵. In such circumstances a job applicant falls within the definition of an employee.
- 5.2.5 Members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and Comsec are excluded from the ambit of the LRA and therefore cannot refer disputes to the CCMA.
- 5.2.6 An employer may in certain circumstances refer a dispute to the CCMA. While an employee must be a natural person, an employer may be a natural or a juristic person. A juristic person is a legal entity that is made up of natural persons but is separate and distinct from such natural persons. Accordingly, employers that may refer disputes to the CCMA include –
- sole proprietors;
 - partnerships;
 - close corporations;
 - private companies;

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¹ Section 191 of the LRA

² Section 41 of the BCEA

³ Section 191 of the LRA. Ex-employees may only refer unfair labour practice disputes if they arose at a time when they were still employed. See *Velinov v University of Kwazulu-Natal & others* [2006] 27 ILJ 177 (LC)

⁴ Section 9 of the EEA

⁵ Sections 6 to 10 of the EEA

- public companies; and
- any other legal entity, such as, a university, church or non-profit organisation.

5.2.7 In the event of insolvency, liquidation or death of an employer, or where the employer is a mental patient, the trustee, liquidator, executor or curator, as the case may be, must be cited in his/her official capacity, for example, Mr X in his capacity as the trustee of the insolvent estate of Mr A Employer; Mr Y in his capacity as the liquidator of ABC (Pty) Ltd; Mrs Z in her capacity as the executrix of the deceased estate of Mr B Employer; or Mr ZZ in his capacity as curator of C Employer.

5.3 Which form is used to refer a dispute to the CCMA?

5.3.1 LRA Form 7.11, the referral form, is used to refer disputes to the CCMA for conciliation or con-arb.

5.4 What are the time periods for referring a dispute to the CCMA?

5.4.1 A dispute must be referred to the CCMA within the time periods specified in the LRA or any other applicable Act.

5.4.1 An unfair dismissal dispute must be referred to the CCMA for conciliation within 30 days of the date of dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or to uphold the dismissal.⁶ Where the dismissal was on notice, the dispute must be referred within 30 days from date on which the notice expires, or if it is an earlier date, the date on which the employee was paid all outstanding salary.

5.4.2 An unfair labour practice dispute must be referred to the CCMA for conciliation within 90 days of the act or omission that allegedly constitutes an unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or omission.⁷

5.4.3 An unfair discrimination dispute must be referred to the CCMA for conciliation within six months of the act or omission that allegedly constitutes unfair discrimination.⁸

5.4.4 Any other dispute, where no time period is expressly provided, should be referred to the CCMA for conciliation within a reasonable time.

5.4.5 Unfair dismissals, unfair labour practises or unfair discrimination

⁶ Section 191 (1)(b)(i)

⁷ Section 191 (1)(b)(ii)

⁸ Section 10 (2) of EEA

disputes must be referred to the CCMA for arbitration within 90 days after the dispute has been certified as unresolved. Where the certificate is not issued, the applicant is not barred to refer the matter to arbitration once the 30 days period of resolving the dispute lapses.

- 5.4.6 Where a dispute is referred outside the specified time periods, the late referral may be condoned on good cause shown if there is provision for condonation. See Chapter 16 - Condonations.
- 5.4.7 Specified time periods must be calculated in terms of calendar days.

5.5 How is a referral document served and filed?

- 5.5.1 Generally, a referring party must serve a copy of the referral form or the request for arbitration on the other party by hand delivery, email, fax, registered mail, telegram or leaving a copy at the premises of the other party.⁹ See Chapter 3 – Notice and Service.
- 5.5.2 The referring party must attach proof of service of the referral document, before filing the referral document with the CCMA.¹⁰
- 5.5.3 A referral document is filed with the CCMA-
- once it is received by the CCMA; and
 - after proof has been provided that the original was served on the other party, by hand or registered mail, email or fax.¹¹

5.6 When is the referral form valid?

- 5.6.1 The CCMA accepts forms that contain the following information –
- the correct citation of parties (essential)
 - a list of names of applicants that are party to the dispute (essential)
 - correct addresses including email/fax numbers (essential)
 - signature by applicant/authorised representative (essential)
 - nature of the dispute (essential)
 - date of dispute (essential)

⁹ Rule 5

¹⁰ Rule 5

¹¹ Rule 7

- area where dispute arose
- outcome sought [e.g. Re-instatement]
- application for condonation [where applicable]
- proof of service (essential)

5.6.2 Where a referral form does not meet any of the above requirements it is defective or invalid. In such circumstances the referral form should not be processed. The dispute is not properly referred to the CCMA until the defect in the referral form has been rectified.

5.6.3 Where it appears from the referral document that the dispute falls within the jurisdiction of a council, the dispute must be referred to the relevant council.

5.7 May a party, who did not receive a copy of a referral form, raise the non-service of the form at arbitration?

5.7.1 The Labour Court has held that –

- an employee's failure to serve a referral form (the LRA Form 7.11) on an employer must be raised by the employer during conciliation if the matter is set down as a con-arb or conciliation;
- the employer cannot raise the non-service of the form at arbitration in an attempt to prevent arbitration proceedings.¹²

5.8 May a party amend the signature on a referral form by substituting the page, with the incorrect signature, with another page that has a correct signature?

5.8.1 In a Labour Court decision, an employee sought to amend a request for arbitration form that had been signed by his labour consultant, by substituting the defective page with a new page signed by himself. The Court held that the commissioner properly accepted the amended page and the CCMA had jurisdiction to arbitrate.¹³

5.9 What should be done where a referral form in respect of which a council has jurisdiction is incorrectly filed with the CCMA?

5.9.1 The CCMA should refer the referral to the council.

5.9.2 In such event, the date of the Commission's initial receipt of the dispute will be deemed to be the date on which the CCMA referred the dispute to the council.¹⁴

¹² *P Maeller & Co (Pty) Ltd v Levendal & others* (2002) 8 BLLR 782 (LC)

¹³ *Liberty Life Association of South Africa Ltd v Hiemstra & others* (2001) 6 BLLR 620 (LC)

¹⁴ Section 147(7)

5.10 Does the right to refer a dispute prescribe?

5.10.1 Extinctive prescription applies to employment law. If a dispute is referred late, e.g. if a dismissal dispute is referred later than 30 days from the date of dismissal or from the date on which the employer made a final decision to dismiss or uphold the dismissal, the late referral may be condoned. However, if such dispute is referred to the CCMA more than three years from the date that the employee acquired the right to refer a dispute to the CCMA, the right to refer a dispute has prescribed and it is no longer possible to condone the late referral.

5.11 Must employee parties wishing to pursue claims for statutory monies along with other disputes, refer such claims by including it in the Form 7.11?

5.11.1 In terms of section 74 of the BCEA claims for monies due in terms of the BCEA may be referred with unfair dismissal disputes and disputes about severance pay.

5.11.2 The claim for such statutory monies must be included in the initial referral (Form 7.11) for severance pay otherwise the arbitrating commissioner will be precluded from making an order relating to payment of such statutory monies but no longer in the case of unfair dismissals.¹⁵

¹⁵ *Douglas & others v Gauteng MEC for Health* [2008] 5 BLLR 401 (LC)

Chapter 6: The pre-conciliation

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6.1 What is a pre-conciliation?

- 6.1.1 In terms of Rule 12 the CCMA or a commissioner may contact the parties by telephone or other means prior to the commencement of a conciliation hearing, in order to seek to resolve the dispute.
- 6.1.2 The “pre-con” is a process during which an attempt is made to resolve a dispute before scheduling a conciliation (or con-arb) hearing.¹
- 6.1.3 It is similar to a conciliation process, except that it is conducted in an informal manner without the parties having to attend a formal conciliation that has been set down for hearing. Accordingly, all the requirements that relate to a conciliation process apply to the pre-con.

6.2 Who may conduct a pre-conciliation process?

- 6.2.1 The pre-con process may be conducted by-
 - any person authorised to do so by the CCMA; or
 - a commissioner.

6.3 When can a pre-conciliation process be conducted?

¹ See *GIWUSA on behalf of Heyneke v Klein Karoo Kooperasie Bpk* (2005) 26 ILJ 1083 (LC)

6.3.1 The pre-con process may be conducted at any time prior to the commencement of a conciliation (or con-arb) hearing, e.g.-

- when a party first approaches the CCMA to refer a dispute;
- when a party returns to the CCMA with proof of having served the referral form, LRA Form 7.11, on the other party;
- when a referral form is received by any other means, with proof of service on the other party; or
- any time after the parties have been notified of the date the conciliation (or con-arb) is set down for hearing.

6.4 Which disputes can be subjected to a pre-conciliation?

6.4.1 There are no limits to the nature of the dispute that may be subjected to the pre-con process. However, it is recommended that the process should only be utilised in respect of simple disputes involving single employees in respect of-

- unfair dismissal disputes;
- unfair labour practice disputes;
- disputes relating to probation;
- severance pay disputes; and
- disputes relating to unilateral change to terms and conditions of employment.

6.5 What are the guidelines for conducting a pre-conciliation?

6.5.1 The pre-con process may be conducted telephonically or by any other means.

6.5.2 Prior to contacting the parties telephonically, the person conducting the pre-con should first ascertain the identity and telephone details of each party from the referral form or the referring party, if such party is present.

6.5.3 When contacting the parties telephonically, the person conducting the pre-con should-

- Introduce himself/herself to the party being contacted, briefly explain the reason for the call and ascertain whether it is convenient for the party to discuss the matter at the time. When contacting the

employer, the person should ask to be put through to the HR or IR Department or to the person who is responsible for these functions.

- Ascertain if the party being contacted is represented and obtain consent to contact any representative, which may be a union official or attorney in the case of an employee party, or an employers' organisation or attorney in the case of the employer party.
- Explain to each party or party's representative the nature of the pre-con process (conciliation) and the manner in which it will be conducted.
- Obtain each party's consent to participate in the pre-con process.
- Explain to each party or party's representative what will happen if the matter is resolved or unresolved at pre-con.
- Attempt to resolve the dispute through conciliation.

6.6 What are the CCMA's obligations once the pre-conciliation is completed?

6.6.1 Where the dispute is settled at pre-con, the person conducting the process should -

- Draft a settlement agreement on the prescribed settlement agreement form;
- Arrange with the parties to sign the settlement agreement;
- Arrange for the original settlement agreement to be lodged with the CCMA;
- Issue a certificate of outcome recording that the dispute has been resolved, once the signed settlement agreement has been received. Where the pre-con has been conducted by a person other than a commissioner, that person should arrange for a certificate of outcome to be issued by a commissioner, as only a commissioner may issue a certificate of outcome;
- Forward the certificate of outcome and the signed settlement agreement to the relevant CMO in order for the file to be closed;
- When the process has been finalised, the person conducting the pre-con should complete the prescribed pre-con report and record the outcome of the process.

6.6.2 Where the dispute is unresolved at pre-con, the person conducting the process should-

- Attempt to obtain the consent of both parties to issue a certificate of outcome stating that the dispute remains unresolved. If the parties consent to a certificate being issued, they should be informed that the matter will proceed to the next stage, being arbitration, and that they will not have to attend conciliation proceedings. The person conducting the pre-con should then issue or arrange for the issue of a certificate of outcome.
- Where the parties consent to the issue of a certificate of outcome, the person conducting the pre-con should inform the CMO not to set the matter down for conciliation or to remove the dispute from the conciliation roll, if a hearing has already been scheduled.
- Where the parties do not consent to the issue of a certificate of outcome, the person conducting the pre-con should inform them to attend the conciliation (or con-arb) hearing that will be or has been scheduled.
- If the dispute is to be or has been scheduled for a con-arb hearing, the person conducting the pre-con should inform the parties of the right to object to con-arb proceedings and the time period for doing so [where applicable].
- If the dispute is to be or has been set down for conciliation or if either party has or intends to object to con-arb proceedings, the person conducting the pre-con should advise the employee party to serve and file a request for arbitration form in the event that the dispute is unresolved at conciliation or con-arb.
- When the process has been finalised, the person conducting the pre-con should complete the prescribed pre-con report and record the outcome of the process.

6.7 What are the advantages of a pre-con process?

The pre-con gives the parties an opportunity to resolve the dispute themselves before it is formally dealt with by the CCMA. It is a speedy and cost effective way of finalising disputes as it prevents unnecessary delays for the parties. It also maximises the scarce resources of the CCMA.

Chapter 7: Con-arb

Contents

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- 7.6 What procedure is followed where there is an objection to the con-arb process and only the employer party attends?
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- 7.13 Who may represent the parties at con-arb?
- 7.14 Do other provisions contained in the LRA and the CCMA Rules, which apply to conciliation and arbitration proceedings, apply to the con-arb process?
- 7.15 What are the advantages of a con-arb process?
- 7.16 Does a commissioner have a discretion to overturn a party's objection to the con-arb process?

7.1 What is a con-arb?

7.1.1 The con-arb is a combination of the conciliation and arbitration proceedings into one process. Although the conciliation and arbitration remain distinct, they are conducted as one hearing on the same day. Accordingly, where a dispute is unresolved at conciliation the arbitration commences immediately thereafter. It is to be noted however that this expedited process is limited to a specific range of disputes.

7.2 Which disputes can be subjected to con-arb?

7.2.1 The LRA draws a distinction between disputes that **must** be dealt with through con-arb and those that **may not** be dealt with through con-arb. The Labour Court has held that the CCMA may only utilise the con-arb process in circumstances specified in the LRA and, where consent is required, if no party objects. It is not possible for any party to object to the con-arb process if the dispute concerns the dismissal of an employee for any reason relating to probation or any unfair labour practice relating to probation.

7.2.2 The con-arb process **must** be followed if the dispute concerns-

- the dismissal of an employee for any reason relating to probation;
- any unfair labour practice relating to probation; and
- any other dispute contemplated in section 191 (5) (a) if there is no objection to con-arb ;

7.2.3 The disputes contemplated in section 191 (5) (a) are disputes where-

- the employee alleges that the reason for dismissal relates to the employee's conduct or capacity, except where the alleged reason for dismissal relates to the employee's participation in an unprotected strike;
- the employee alleges that the reason for his dismissal is that the employer made continued employment intolerable (constructive dismissal) or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, except where the employee alleges that his dismissal was automatically unfair;
- the employee does not know the reason for his dismissal; or
- the dispute relates to an unfair labour practice.

7.2.4 The con-arb process may not be followed in respect of disputes relating to-

- organisational rights;
- the interpretation or application of collective agreements;
- workplace forums;
- dismissals regarding the non-renewal of fixed term contracts or the renewal of fixed term contracts on less favourable terms except if the reason for the non-renewal is related to the employee's conduct or capacity or if the employee does not know the reason;
- automatically unfair dismissals;
- dismissals based on operational requirements;
- dismissals relating to participation in an unprotected strike;
- dismissals where the employee alleged the reason was because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement; and
- entitlement to severance pay.

7.3 How are parties notified of the con-arb process?

7.3.1 The CCMA is required to give the parties at least fourteen days written notice that the matter is scheduled for con-arb.

7.3.2 The notice of con-arb should contain guideline information to assist the parties to prepare for the hearing. The information should, among other things-

- explain the con-arb process and its advantages;
- advise the parties of how to prepare for the process;
- deal with how to object to con-arb;
- outline who may represent parties at con-arb; and
- specify the consequences of failure to attend the con-arb process.

7.4 In respect of what disputes may a party object to con-arb and how may it be done?

7.4.1 It is not possible for any party to object to the con-arb process if the dispute concerns the dismissal of an employee for any reason relating to probation or any unfair labour practice relating to probation. However, any party to a dispute referred to in paragraph 7.2.3 above, may object to the con-arb and hence to the arbitration proceeding immediately after the conciliation.

7.4.2 An objection is effected by completing paragraph 11 of the referral form, LRA Form 7.11 or by delivering a written notice of objection to con-arb to the CCMA and the other party, at least 7 days prior to the scheduled date of the process. Accordingly commissioners dealing with disputes specified in paragraph 7.2.3 above should always establish whether there is objection to con-arb, by referring to the referral form or any filed written objection.

7.5 What procedure is followed where there is an objection to the con-arb process and both parties attend?

7.5.1 In such cases only the conciliation is conducted.

7.5.2 Where the dispute is settled at conciliation, the commissioner dealing with the matter should issue a certificate of resolution and ensure that the parties sign a settlement agreement.

7.5.3 Where the dispute is unresolved at conciliation the commissioner should issue a certificate of non-resolution. Thereafter, if the LRA requires arbitration, the commissioner should advise the employee party that he/she is required to request the CCMA to arbitrate the matter by serving and filing a completed request for arbitration form, LRA Form 7.13.

7.5.4 It is to be noted that where there is an objection to con-arb, the CCMA may not schedule the matter for arbitration unless there is proof that the request for arbitration has been completed and served on the employer.

7.6 What procedure is followed where there is an objection to the con-arb process and only the employer party attends?

7.6.1 Once there is a valid objection, the con-arb process is converted to a conciliation process only and it is not open to a commissioner to dismiss the matter in the absence of the employee party. A certificate of non-resolution must be issued in terms of section 191 (5) of the LRA and the file must be forwarded to registry to await the employee's request for arbitration.

7.7 What procedure is followed where there is an objection to the con-arb process and only the employee party attends?

7.7.1 In such cases the commissioner must issue a certificate of non-resolution and advise the employee to serve and file a request for arbitration timeously.

7.8 What procedure is followed where there is an objection to the con-arb process and both parties fail to attend?

7.8.1 A certificate of non-resolution must be issued in terms of section 191(5) of the LRA and the file must be forwarded to registry to await the employee's request for arbitration.

7.9 What procedure is followed where there is no objection to the con-arb process and both parties attend?

7.9.1 The commissioner should conciliate the matter, if unresolved the commissioner should issue a certificate of non-resolution and proceed to arbitrate the matter immediately thereafter.

7.10 What procedure is followed where there is no objection to the con-arb process and only the employee party attends?

7.10.1 If the commissioner is satisfied that the employer was notified of the hearing, he/she should issue a certificate of non-resolution and then deal with the arbitration part of the con-arb process. In terms of section 138 (5) the commissioner must then exercise a discretion whether to continue with the arbitration proceedings in the absence of the employer party or to adjourn the arbitration proceedings to a later date.

7.11 What procedure is followed where there is no objection to the con-arb process and only the employer party attends?

7.11.1 Where the commissioner is satisfied that the employee was notified of the hearing, he/she should issue a certificate of non-resolution and may dismiss the matter at arbitration.

7.11.2 However, where the commissioner is not satisfied that the employee was notified of the hearing, he/she should issue a certificate of non-resolution and postpone the arbitration so that the employee can be properly notified. The file should then be forwarded to registry to reschedule the arbitration.

7.12 What procedure is followed where there is no objection to the con-arb process and both parties fail to attend?

7.12.1 Where the commissioner is satisfied that the employee was given notice of the hearing, he/she should issue a certificate of non-resolution and then dismiss the matter at arbitration.

- 7.12.2 However, if the commissioner is not satisfied that the employee was notified of the hearing he/she should still issue a certificate of non-resolution and then postpone the arbitration so that the employee can be duly notified. The file should then be forwarded to registry to schedule the arbitration for another date.

7.13 Who may represent the parties at con-arb?

- 7.13.1 In this regard refer to Rule 25 of the CCMA rules and Chapter 4, which deals with representation.

7.14 Do other provisions contained in the LRA and the CCMA Rules, which apply to conciliation and arbitration proceedings, apply to the con-arb process?

- 7.14.1 All provisions of the LRA and the Rules relating to conciliation and arbitration proceedings apply to the con-arb process with the necessary changes required by the context.

7.15 What are the advantages of a con-arb process?

- 7.15.1 The con-arb process is a speedy and cost effective way of finalising disputes as it prevents unnecessary delays for the parties. It also maximises the scarce resources of the CCMA.

7.16 Does a commissioner have a discretion to overturn a party's objection to the con-arb process?

A commissioner does not have a discretion to overturn a party's objection to the con-arb process, which complies with the requirements of the LRA and the CCMA Rules.

Chapter 8: Conciliation

Contents

- 8.1 What disputes must be conciliated?
- 8.2 What are the jurisdictional prerequisites to be met before a dispute may be conciliated?
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- 8.4 Who may represent a party at conciliation?
- 8.5 What are the general functions and obligations of the conciliator?
- 8.6 What should a commissioner do at the commencement of the process?
- 8.7 What methods are generally adopted to break a deadlock?
- 8.8 What are the ethical rules that a conciliator should observe?
- 8.9 Can a commissioner change the nature of the dispute?
- 8.10 Can a conciliator permit an employee to amend his /her statement of case as set out in the referral form?
- 8.11 What are the functions of a conciliator on conclusion of conciliation?
- 8.12 What should be done if a matter is set down for conciliation only and the referring party fails to attend?
- 8.13 What jurisdictional rulings may be made at conciliation?
- 8.14 What approach should be adopted in the event of an objection against the CCMA's jurisdiction to conciliate on the ground that no employment relationship existed or that no dismissal occurred or that the dispute was settled earlier?
- 8.15 Can there be a valid request for arbitration despite a ruling that the CCMA does not have jurisdiction to conciliate?
- 8.16 What procedure should be followed if the conciliation meeting was scheduled late?
- 8.17 What is a Redline matter?
- 8.18 What procedure is to be followed when a Redline matter is erroneously set down in a region?

8.1 What disputes must be conciliated?

- 8.1.1 Any dispute referred to the CCMA in terms of specific provisions of the LRA that requires conciliation.
- 8.1.2 Disputes about matters of mutual interest referred to the CCMA in terms of section 134.¹
- 8.1.3 Any dispute that the CCMA is required to conciliate in terms of the provisions of any other Act.
- 8.1.4 See paragraph 2.7 for further details.

8.2 What are the jurisdictional prerequisites to be met before a dispute may be conciliated?

- 8.2.1 A dispute concerning a matter in respect of which the CCMA has jurisdiction to conciliate, must exist or the referring party must have alleged that such dispute exists;
- 8.2.2 At the time of the conciliation the dispute must still exist, i.e. it must not have been settled already or there must be an allegation that it still exists, i.e. that it remains unresolved;
- 8.2.3 An employment relationship must have existed between the parties at the time that the dispute arose² (except disputes concerning a failure to re-employ in terms of an agreement; discrimination against job seekers; and disputes to which a union may be a party);³

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¹ The term “*matters of mutual interest*” is not defined in the Act. On a literal interpretation it means any issue concerning employment that is of interest to the employer and employee parties to the dispute. It has been given a wide interpretation and includes disputes of right as well as of interest. However most matters of mutual interest referred to the CCMA, in terms of section 134 of the LRA, are interest disputes. *Rand Tyres and Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108; *Du Toit et al The Labour Relations Act of 1995 2ed Butterworths 1998 at 198* and *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 5 BLLR 578 (LC).

² *MEC for Tourism, Environmental & Economic Affairs, Free State v Nondumo & others* [2005] 10 BLLR 974 (LC)

³ It is now settled law that the actual existence of an employment relationship need not be proved prior to conciliation. See *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* [2010] 2 BLLR 149 (LC), the judgment of Cele J in *EOH Abantu (Pty) Ltd v CCMA & others* (2010) 31 ILJ 937 (LC); [2010] 2 BLLR 172 (LC) and *Bombardier Transportation (Pty) Ltd v Lungile Mtiya N.O. & others* [2010] 8 BLLR 840 (LC). In *Wardlaw v Supreme Moulding (Pty) Ltd* [2007] 6 BLLR 487 (LAC), it was found that a factual allegation about jurisdiction is provisionally accepted before the commencement of a trial provided that it is proved during the trial. As implied in the *Gold Fields Mining* case there is no reason why the same should not apply at an earlier stage such as conciliation. In cases where it is alleged by the referring party that an employment relationship existed, such allegation is provisionally accepted subject to the factual allegation being proved at arbitration, if the alleged dispute is arbitrable. See *EOH Abantu (Pty) Ltd v CCMA & others (supra)*. It is more correct to say that jurisdiction is determined on what was pleaded or alleged. If the CCMA has the power or competence to arbitrate the alleged dispute then the applicant must prove what

- 8.2.4 The referring party or a duly authorised representative (permitted to represent that party in terms of the rules) must have referred the dispute to the CCMA and the referral document must have been properly signed;
- 8.2.5 The referral must not have been effected prematurely;⁴
- 8.2.6 The referral must have been effected timeously;
- 8.2.7 A late referral must have been accompanied by an application for condonation;
- 8.2.8 The referral document (and the condonation application, if any,) must have been served upon the other party.
- 8.2.9 Any late referral must have been condoned. The 30 day period referred to in sections 135 (2) and 135 (5) must not have expired or else the parties must have consented to an extension of the period. An extension cannot be agreed after the expiry of the 30-day period. (In terms of section 135 (2), a certificate must be issued at the end of the 30 day period).

8.3 What notice must be given of the conciliation meeting?

- 8.3.1 The notice must be in writing. The notice may be supplemented by a short message system (sms) or by a telephone call from the CCMA.

8.4 Who may represent a party at conciliation?

- 8.4.1 A party may appear in person or be represented by the categories of representatives in Rule 25 of the CCMA Rules and Chapter 4.

8.5 What are the general functions and obligations of the conciliator?

- 8.5.1 The conciliator must determine whether or not the jurisdictional prerequisites for conciliation were met.⁵
- 8.5.2 The conciliator must determine a process to attempt to resolve the dispute and to assist the parties to resolve a dispute which may include-
- mediating the dispute;

was alleged in order to be granted relief. It is also more correct to regard an objection that no employment relationship existed as a special plea which needs to be determined alongside the other issues during the arbitration. See the Constitutional Court judgment in *Gaba v Minister of Safety & Security & others* (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 680 (LC) and the SCA judgment in *SAMSA v McKenzie* (017/09) [2010] ZASCA 2 (15 February 2010).

⁴ *Avgold –Target Division v CCMA & others* (2010) ILJ 924 (LC); [2010] 2 BLLR 149 (LC)

⁵ See Rule14

- conducting a fact finding exercise; and
 - making a recommendation to the parties which may be in the form of an advisory arbitration award.
- 8.5.3 The nature of the process, the procedure to be followed and the implications of settlement or a failure to settle, must be explained to the parties at the commencement of the process;
- 8.5.4 The conciliator should create a comfortable environment that is conducive to settlement and should promote effective and fair participation;
- 8.5.5 Should the parties not be able to resolve the dispute on their own, the conciliator should act as a mediator and assist the parties to break the deadlock;
- 8.5.6 Should the parties reach an agreement the conciliator should ensure that the agreement is accurately recorded in writing and signed by all parties and must thereafter issue a certificate that the matter is resolved;
- 8.5.7 The conciliator must ensure that any settlement agreement is enforceable and give guidance to the parties in this regard;
- 8.5.8 Should the dispute remain unresolved, the conciliator must issue a certificate reflecting, *inter alia*, that the dispute referred for conciliation remained unresolved.
- 8.6 What should a commissioner do at the commencement of the process?**
- 8.6.1 Introduce himself/herself to the parties;
- 8.6.2 Ask the parties to introduce themselves by stating their names, position/ capacity and their conciliation experience;
- 8.6.3 Ensure that the parties complete and sign the attendance register;
- 8.6.4 Set the rules, e.g. switching off cell phones, no interruption of the other party, etc;
- 8.6.5 Disclose to the parties the extent of his/her pre-conciliation contact with them. Such contact may include meetings or telephone conversations with one or both or all of the parties on a separate basis. Contact would also include receipt of documentation relevant to the dispute (or the parties). When making disclosures, the commissioner should point out the documentation that was received and the other party(ies) must be allowed to examine it;

- 8.6.6 Disclose any relevant previous experience or relationship with individuals representing the parties whether in a personal or professional capacity.
- 8.6.7 Explain the procedure to be followed, i.e that there would be an opportunity for opening statements in a joint meeting, that there would be opportunity for meeting separately with the commissioner, that there would be a joint closing meeting and that these meetings may be used for story telling and problem solving.
- 8.6.8 Explain that the meeting will be conducted on a “without prejudice” basis, i.e that nothing that the parties say during the conciliation process can be held against them in another process, should conciliation fail, unless it is recorded in an agreement signed by the parties that admissions were made on a with prejudice basis.
- 8.6.9 Stress the confidential nature of the process. This means in regard to the process as a whole, the commissioner will not reveal any details of what takes place during the process to anyone outside the process except on the order of a court.⁶ In respect of separate sessions that the commissioner may hold with the parties, it is vital that they understand that he/she will not reveal information elicited from one party in a separate session to another party unless he/she has been given express permission to do so;
- 8.6.10 Explain that the purpose of his/her note taking is to aid his/her memory during the conciliation and not to pass on to anyone.
- 8.6.11 Explain that the conciliation process frequently requires a conciliator to spend considerable time talking to the parties in separate sessions or caucuses as separate sessions allow the parties to engage with a conciliator in a more open fashion;
- 8.6.12 Explain that he/she will control the separate sessions. In other words, he/she will decide when he/she wants to break out of a joint session and into a separate session or caucus, and which party he/she would like to meet first. It is important to mention that the time he/she will take with each party may differ since the discussions that he/she will be having with them will often be different.

8.7 What methods are generally adopted to break a deadlock?

- 8.7.1 Reality testing during side caucuses and advising a party with poor prospects of the consequences of not accepting an offer that was made.

⁶ In terms of section 126(3), the CCMA may not disclose to any person or in any court, any information, knowledge or document that is acquired on a confidential basis or without prejudice, in the course of performing its functions, except on the order of a court.

- 8.7.2 Suggesting to parties that they should compromise at a point somewhere between their positions as it were when the deadlock was reached.
- 8.7.3 Suggesting that the parties should disclose their bottom lines.
- 8.7.4 Making suggestions as to other options available to the parties.
- 8.7.5 Making a recommendation as to a fair basis on which the dispute may be settled.
- 8.7.6 Making an advisory award, which is not binding on the parties, but is an indication of the likely outcome of a subsequent arbitration or adjudication, (if applicable), or a likely way in which strike action may be avoided, (if applicable).

8.8 What are the ethical rules that a conciliator should observe?

- 8.8.1 A party should not be misled as to prospects of success so as to induce a settlement.
- 8.8.2 A party should in particular not be advised that he/she/it is facing a costs order unless it is justified by the circumstances.
- 8.8.3 A conciliator should not disclose to a party confidential information disclosed to him/her by the other party and particularly not what the other party's confidential bottom line is.
- 8.8.4 At the end of the conciliation, the conciliator's notes should be destroyed and not left in the file.
- 8.8.5 Conciliators should under no circumstances intimidate a party to settle a dispute.
- 8.8.6 Conciliators should not accept any gift or any other consideration from any party to a dispute.
- 8.8.7 Conciliators must not conciliate disputes to which their family and friends are parties.
- 8.8.8 Conciliators should not adopt an overly friendly approach to the one party and not treat the other party in the same way.
- 8.8.9 Conciliators should at all times remain objective and take special care not to create any perception of bias.

8.9 Can a conciliator change the nature of a dispute?

8.9.1 A conciliator is obliged to ascertain the nature of the real dispute that was referred for conciliation and, having done so, to conciliate that dispute. Neither a party nor the conciliating commissioner can change the nature of the dispute between the parties. A certificate of non-resolution should contain the correct description of the real dispute that was referred to conciliation.⁷

8.10 Can a conciliator permit an employee to amend his /her statement of case as set out in the referral form?

8.10.1 Subject to paragraph 8.9.1 above, nothing prevents a party from seeking to amend a statement of case as set out in the referral, or prevents commissioners from granting such applications, where appropriate, i.e. provided that the other party will not be prejudiced.⁸

8.11 What are the functions of a conciliator on conclusion of conciliation?

8.11.1 If the dispute is resolved the conciliator must -

- assist the parties by drafting the settlement agreement accurately;
- check that the agreement is enforceable and, if it is not, advise the parties to amend it appropriately and of the consequences of not doing so;
- ensure that all parties to the agreement sign the agreement;
- place the original agreement in the CCMA file;
- hand a copy of the agreement to each of the parties;and
- promote commitment to and compliance with the terms of the agreement.

8.11.2 If an agreement is not reached, the conciliator must -

- confirm that the dispute remains unresolved;
- in the certificate of outcome, accurately reflect the nature of the dispute as agreed between the parties or, in the absence of agreement, as categorised by the referring party;
- facilitate agreement regarding what issues are still in dispute between the parties (narrow the issues);

⁷ *National Union of Metal Workers of SA & others v Driveline Technologies (Pty) Ltd* (2000) 21 ILJ 142 (LAC). See also *Zeuna-Starker BOP (Pty) Ltd v NUMSA* [1998] 11 BLLR 1110 (LAC).

⁸ *Chetty v Department of Education & another* [2007] 6 BALR 506 (ELRC)

- advise the parties of the next step / process, and the procedure to follow;
- give advice regarding the forum for the next process; and
- if the dispute is to be arbitrated, the conciliator should elicit information from the parties regarding whether or not they will be represented/sought to be represented by legal practitioners, the particulars of such legal practitioners; if and when a pre-arbitration conference will be held; the number of witnesses to be called; the time needed for the arbitration and the addresses/email addresses/fax numbers to which the notice of set down of the arbitration must be sent (where applicable);
- where possible, arrange the dates for the arbitration with the parties, arrange for them to receive the notices of set down and to acknowledge receipt thereof.

8.11.2 If there are indications that parties may find a solution, if given more time, and where no agreement is reached at the end of the scheduled conciliation time, the conciliator must-

- encourage the parties to agree on a process to resolve the dispute between themselves;
- by consent, extend the period for 7 (seven) days and if no settlement agreement is filed, the commissioner will issue a certificate of non-resolution;
- continue to conciliate the dispute by engaging with the parties telephonically if the parties agree to it;
- in exceptional cases, convene another conciliation hearing. (This option should be reserved for complex matters of mutual interest where there is an obvious public interest in resolving the dispute through conciliation. Given the caseload, this is not a viable option for ordinary individual cases); and
- ensure that he/she is informed of the outcome so that a certificate can be issued, the outcome report completed and the case closed or allowed to proceed to the next process;

8.11.4 Irrespective of whether or not the dispute is resolved, the conciliator must-

- issue a certificate stating whether or not the dispute has been resolved;

- hand a copy of the certificate to the parties who attended the conciliation;
- file the original of the certificate with the CCMA;
- leave the parties with a good impression of the CCMA and its dispute resolution system; and
- complete the outcome report and file it with the CCMA.

8.12 What should be done if a matter is set down for conciliation only and the referring party fails to attend?

- 8.12.1 The matter should not be dismissed. A certificate of outcome must be issued and placed in the file. In cases where the dispute is arbitrable a request for arbitration will be processed once the LRA Form 7.13 is received.⁹
- 8.12.2 However, if a referring party does not attend the conciliation meeting and it appears from the referral or from other evidence that the CCMA does not have jurisdiction to conciliate (e.g. where a late referral was not accompanied by a condonation application), a ruling should be made that the CCMA does not have jurisdiction to conciliate.
- 8.12.3 In the case of disputes involving matters of mutual interest the matter should also not be dismissed if the referring party fails to appear at conciliation. A certificate of outcome should however not be issued automatically but only after the expiry of the 30 day period referred to in section 135 (5) and on request by the referring party.

8.13 What jurisdictional rulings may be made at conciliation?

- 8.13.1 The only true jurisdictional objections¹⁰ that may be raised at conciliation are those that relate to-
- a failure to refer the dispute to conciliation within the prescribed time period (where there is no application for condonation of late referral or where condonation was refused); or
 - a premature referral (e.g. where a dismissal dispute is referred before a dismissal occurred);¹¹

⁹ See *Premier of Gauteng & another v Ramabulana & others* [2008] 4 BLLR 299 (LAC).

¹⁰ *Bombardier Transportation (Pty) Ltd v Lungile Mtiya N.O & others (above)*

¹¹ *Avgold –Target Division v CCMA & others* (2010) ILJ 924 (LC); [2010] 2 BLLR 149 (LC). If the issue was not raised or determined at conciliation it may be raised at arbitration.

- whether a bargaining council has jurisdiction over the parties to the dispute (in the absence of any exercise of discretion conferred by s 147);
- whether the dispute ought to have been referred to private dispute resolution, in terms of an agreement between the parties (in the absence of any exercise of a discretion conferred by s 147);
- whether, on the face of the referral, the dispute referred for conciliation is not one that is contemplated by the LRA, i.e. that the dispute concerns a matter other than a matter of mutual interest between employer and employee;¹²
- whether the referral was effected in accordance with the rules.

8.13.2 If it appears during conciliation that a jurisdictional issue has not been determined, the commissioner must, in terms of Rule 14, require the referring party to prove that the CCMA has jurisdiction to conciliate.

8.13.3 Where it is required by the circumstances, commissioners may accordingly make rulings, at conciliation, that the CCMA does not have jurisdiction to conciliate because-

- the referral was not effected in accordance with the rules, e.g. that it was not properly signed or that it was not served on the other party;
- the dispute was prematurely referred;
- the dispute was not timeously referred and the late referral was not condoned;
- a bargaining council (and not the Commission) has jurisdiction in respect of the dispute;
- the dispute ought to have been referred to a private dispute resolution body in terms of an agreement between the parties; and/or that
- the nature of the alleged dispute is not such that the LRA requires the CCMA to conciliate the alleged dispute.

8.14 What approach should be adopted in the event of an objection against the CCMA's jurisdiction to conciliate on the grounds

¹²*Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others (supra) and Bombardier Transportation (Pty) Ltd v Lungile Mtiya N.O & others (above).*

that no employment relationship existed or that no dismissal occurred or that the dispute was settled earlier?

- 8.14.1 The commissioner appointed to conciliate the matter should attempt to secure an agreement between the parties that the issue whether an employment relationship existed or whether a dismissal occurred or whether the dispute was settled earlier, is to be left for decision by the arbitrating commissioner.¹³

In the absence of an agreement to leave a jurisdictional issue relating to the employment status of the referring party for decision by the arbitrating commissioner, the conciliating commissioner may defer it to arbitration.

- 8.14.2 At conciliation it is sufficient for the employee party to allege that a dismissal occurred. At a subsequent arbitration the employee will bear the onus to prove on a balance of probabilities that a dismissal occurred.¹⁴
- 8.14.3 It is arguable whether a ruling whether or not the dispute was settled earlier should be made at the conciliation stage as evidence may be required on this aspect.

8.15 **Can there be a valid request for arbitration despite a ruling that the CCMA does not have jurisdiction to conciliate?**

- 8.15.1 An arbitration may not be requested under such circumstances. It is a jurisdictional requirement for arbitration that there must have been a valid referral to conciliation. A certificate of non-resolution serves as proof that the conciliating commissioner had ruled that there was a valid referral to conciliation and the CCMA and an arbitrator is bound by the ruling. An arbitrator is likewise bound by a ruling that there was no valid referral of the dispute to conciliation which would normally be evidenced by the absence of a certificate of non-resolution.¹⁵ Such rulings can only be set aside on review by the Labour Court if grounds for setting it aside exist.

8.16 **What procedure should be followed if the conciliation meeting was scheduled late?**

- 8.16.1 If the referring party does not attend, the commissioner must issue a certificate to the effect that the dispute remained unresolved at the end of the 30 day period referred to in Section 135 (5) and leave it to the referring party to request an arbitration (where applicable). The same applies where the non-referring party fails to attend.

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¹³ That it is possible to provisionally accept jurisdiction appears from *Wardlaw v Supreme Moulding (Pty) Ltd* (supra). See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* (supra).

¹⁴ *BHT Water Treatment v CCMA & others* [2002] 2 BLLR 173 (LC).

¹⁵ *ibid*

- 8.16.2 Where both parties attend, they should be requested to consent to an extension of the 30 day period and if such consent is given, it should be recorded in writing and signed by both parties. The dispute should then be conciliated and if it remains unresolved a certificate should be issued reflecting that the dispute remained unresolved as at that day.
- 8.16.3 Where both parties attend and one or both of them refuse(s) to consent to an extension of the 30 day period, a certificate should be issued reflecting that the dispute remained unresolved as at the end of the 30 day period.¹⁶

8.17 How to conciliate unfair discrimination cases?

- 8.17.1 The emphasis must be on conciliating the dispute thoroughly and treating the parties with dignity rather than on settling or dismissing the dispute.
- 8.17.2 The conciliator must strike a balance between being an independent neutral person and showing empathy to both parties without assuming the role of a counsellor.
- 8.17.3 The process should be made flexible in terms of duration, venue and order of proceedings, taking into account the applicant's choice or preference. The Conciliator must take a proactive if the applicant is unrepresented or if the nature of the dispute include threats and/or intimidation
- 8.17.4 Conciliators should also be sensitive by allowing representatives who may otherwise in terms of the rules not normally permitted i.e. The Women's Legal Centre, Rape Crisis, NGOs dealing with people disabilities.
- 8.17.5 There should be flexibility regarding the use of two conciliators in a single dispute.
- 8.17.6 Conciliators should use their discretion with regard to following the traditional steps in the conciliation process, namely the introductory, story-telling, and problem-solving stages of the process. However, the process does not necessarily need to follow the same order, and the conciliator need to be guided by a deep sense of what is appropriate at any point in the process.
- 8.17.7 The conciliator should explain the remedies or resources available to them in detail. Emphasis should be placed on exploring remedies or outcomes that restore dignity, and promote equality and social justice.

¹⁶ *Indoor Amusements (Pty) Ltd v CCMA & others* (2004) 25 ILJ 2205 (LC); [2004] 10 BLLR 1004 (LC).

- 8.17.8 Jurisdictional points must be dealt with only if they have a potential of rendering the referral defective. Jurisdictional issues that deal with the merits of the case are better dealt with in arbitration.

8.18 What is a Redline matter?

- 8.18.1 A Redline matter is any dispute referred to the CCMA, where-
- 8.18.1 the referring party has the right to engage in industrial action if the dispute is not resolved, and (a) the industrial action could involve more than one region, but has the potential to affect the country as a whole, or (b) the industrial action could involve a strategically important employer or sector in a single region that could affect that region, other regions or the country as a whole; or
 - 8.18.2 the dispute is of a precedent setting nature that has the potential to impact consequentially on labour relations on a wider scale; or
 - 8.18.3 the dispute involves the dismissal of any high profile individual or an unfair labour practice involving any high profile individual; or
 - 8.18.4 where the nature of questions of law are raised by the dispute; or
 - 8.18.5 where the issues of complexity of the dispute are raised; and
 - 8.18.6 where the dispute is of public interest.

8.19 What procedure should be followed when a Redline matter is erroneously set down in a region?

- 8.19.1 In terms of the Policy and Procedure for Dealing with Redline Matters, all such matters are to be handled by the National Office. The National Office may authorise a Redline matter to be heard in a particular region.
- 8.19.2 In circumstances where a Redline matter has not been detected at the screening or allocation stage and has been set down for hearing before a given commissioner in a region without the authorisation of the National Office, and the commissioner ascertains that the dispute satisfies the criteria for a Redline matter, the commissioner must immediately bring this to the attention of the convening senior commissioner.

- 8.19.3 The convening senior commissioner must bring the matter to the attention of the relevant National Senior Commissioner to give appropriate directives.

Chapter 9: The certificate: LRA Form 7.12

Contents

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- 9.2 When and by whom must the certificate be issued in terms of the LRA?
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- 9.12 Must a commissioner arbitrate where a certificate of outcome indicates an automatically unfair dispute but both parties consent that the dispute should be arbitrated at the CCMA?
- 9.13 Should the commissioner commence arbitration where the respondent has already instituted review proceedings at the Labour Court to have the certificate of outcome set aside?
- 9.14 What must the arbitrator do where there is no certificate in the file and neither party can provide a copy of the certificate.

9.1 What is an outcome certificate and what is its purpose?

9.1.1 An outcome certificate is a written document issued by the conciliating commissioner in the form of LRA Form 7.12 at the conclusion of the conciliation process.

9.1.2 It serves as proof-

- of the identity of the parties to the dispute;
- that the conciliator ruled that there was a valid referral of the dispute to conciliation (as that is what the issuing of the certificate implies);
- when the referral was made;
- in the event of a late referral, that the late referral was condoned and when it was condoned;
- that the dispute was conciliated; and
- whether or not the dispute referred to conciliation remained unresolved.

9.1.3 It also records-

- how the referring party categorised the dispute; alternatively, the dispute that was conciliated; and
- advice given to the referring party regarding the next dispute resolution step.

9.2 When and by whom must the certificate be issued in terms of the LRA?

9.2.1 The certificate must be issued by the commissioner appointed to resolve the dispute through conciliation.

9.2.2 The conciliation meeting must be scheduled within 30 days of the date that the dispute was referred, unless the parties to the dispute agree to extend the 30 day period.

9.2.3 If the conciliation meeting is scheduled within the 30 day period or extended period agreed to by the parties, the certificate must be issued at the conclusion of the conciliation meeting.

9.2.4 If the conciliation meeting was not scheduled within the 30 day period and in the absence of an agreement extending the 30 day period, the certificate must be issued at the expiry of the 30 day period even if no conciliation meeting had taken place.

9.3 How should the certificate be completed?

9.3.1 The conciliating commissioner must complete the certificate fully, accurately and legibly. This includes providing the following information –

- The correct case number;
- The correct and full names of both parties. (The commissioner must establish the correct identity of the parties during the conciliation hearing);
- The date when the dispute was first referred to the CCMA. (This is the date the CCMA received the employee's properly completed LRA Form 7.11);
- Full description of the nature of the dispute as described by the referring party in LRA Form 7.11 or as conciliated;
- In the event of a late referral whether and when condonation was granted. (In such case a written condonation ruling must be in the file);
- The relevant outcome i.e. indicating whether or not the dispute was resolved;
- Advice regarding the next available dispute resolution step to take. If the dispute is unresolved, the commissioner must inform the parties of their rights to further dispute resolution processes, e.g. to refer the dispute to arbitration or adjudication, as the case may be, within 90 days, or to strike or lock out after 48 hours notice;
- A note that the employer did not attend where a certificate is issued in the absence of the employer.
- A note that the 30-day period for conciliation expired where a commissioner issues a certificate because the 30-day period for conciliation has expired;
- The name of the commissioner, which must be printed clearly above his signature.

9.4 When must a commissioner not issue a Certificate of Outcome?

9.4.1 A commissioner must not issue a certificate in the following circumstances –

- If the referring party withdraws the dispute at or before conciliation;

- If the parties resolve the dispute themselves ahead of the scheduled conciliation. (The referring party must withdraw the dispute in writing and the file should then be closed);
- If after a condonation hearing, the commissioner does not condone the late referral. (In such event the commissioner must only issue a ruling refusing condonation);
- If the CCMA for any other reason does not have jurisdiction to conciliate.

9.5 Can the information that appears on the certificate be amended?

9.5.1 The commissioner who issued the certificate may correct errors appearing on the certificate. The changes must be made on the original certificate and must be dated and signed. It is not necessary to change advice, such as, advice regarding the next dispute resolution step, as such advice is in any event not binding on the parties.

9.6 What is the importance and the legal consequences of a certificate of outcome?

9.6.1 It provides written proof that the dispute was validly referred for conciliation and whether or not the dispute was resolved at conciliation, i.e. it constitutes sufficient proof that an attempt has been made to resolve the dispute through conciliation.¹

9.6.2 If a dispute remains unresolved, the certificate provides a party, usually the referring party, wishing to pursue the dispute to the next step in the dispute resolution process, with sufficient proof that the dispute remains unresolved.

9.6.3 In cases where there has been an objection to con-arb or where the con-arb process is not permitted, if a certificate is issued, a party wishing to pursue an unresolved rights dispute to arbitration, must request arbitration within 90 days of the date the certificate was issued. Where the LRA requires adjudication by the Labour Court a party wishing to pursue an unresolved dismissal dispute to adjudication by the Labour Court may only do so within 90 days of the date the certificate was issued. The certificate therefore indicates when the 90 day period commenced.²

9.6.4 In disputes concerning matters of mutual interest, e.g. wage disputes, a party may only have recourse to industrial action (strike or lock-out) after a certificate was issued stating that the dispute remains

¹ *National Union of Metal workers of SA v Driveline Technologies (Pty) Ltd & another* (2000) 21 ILJ 142 (LAC). See also section 157 (4). To the extent that a different view was expressed in *Bombardier Transportation (Pty) Ltd v Lungile Mtiya N.O. & others* [2010] 8 BLLR 840 (LC) the *Driveline Technologies* case should be followed as it is a judgment of the LAC.

² Sections 136 (1) (b) and 191 (11)

unresolved, alternatively, after the expiry of 30 days or any agreed extended period from which the dispute was first referred to the CCMA. The certificate constitutes proof that a party complied with the conciliation provisions of the LRA, which is one of the requirements that has to be met before industrial action will be protected.³

- 9.6.5 An arbitrating commissioner and the CCMA do not have the power to set aside a certificate already issued by the conciliating commissioner. This is so even in cases where a commissioner's right to arbitrate is challenged because the original referral of the dispute was out of time and the lateness not condoned.⁴

9.7 What effect does the categorisation of a dispute on the certificate have on subsequent proceedings?

- 9.7.1 A commissioner who conciliates a dispute is not called upon to adjudicate or arbitrate such dispute. He might take one or other view on certain aspects of the dispute but whether the dismissal is, for example, due to operational requirements or to misconduct or incapacity, does not affect his/her jurisdiction.

- 9.7.2 The description of the dispute on the certificate has no bearing on the future conduct of the proceedings. The forum for subsequent proceedings is determined by what the employee alleges the dispute to be. According to this characterisation an employee may either request the CCMA to arbitrate the dispute or may refer it to the Labour Court. It is unnecessary to consider at conciliation what the consequences would be if the employee's categorisation of the dispute turns out to be incorrect.⁵ If there are grounds for believing that the employee's categoration is incorrect the employee should be advised to consider whether the correct dispute was referred to the CCMA and, if necessary, to obtain advice as to whether there is a need to correct the referral before proceeding to the next dispute resolution step.

- 9.7.3 Where a conciliating commissioner purports to change the description of the dispute between the parties, a party that seeks to take the matter further would not be bound by a wrong description of the dispute but would have a right to take the true dispute that was referred to conciliation and to give a correct description of the dispute. What the

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³ Section 64 (1) (a) (i)

⁴ Section 144 of the LRA

⁵ See *National Union of Metalworkers of SA & others v Driveline Technologies (Pty) Ltd & another (supra)*. The Labour Appeal Court ruled that parties are not bound by the conciliating commissioner's description of the dispute in the certificate of outcome contemplated in section 135 (5). That jurisdiction is determined on what the applicant alleges, was confirmed by the Constitutional Court judgment in *Gcaba v Minister of Safety & Security & others* (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 680 (LC) and the SCA judgment in *SAMSA v McKenzie* (017/09) [2010] ZASCA 2 (15 February 2010). If the applicant fails to prove what was alleged it means that he failed to prove the claim and is for that reason not entitled to relief.

parties are bound by is the correct description of the dispute that was referred to conciliation.

9.7.4 Misconduct and incapacity related dismissal disputes are arbitrable by the CCMA provided that such dismissals are not alleged to have been automatically unfair. The categorisation on the certificate does not determine the nature of the dispute and an arbitrator must make a ruling based on the evidence as to the real nature of the dispute and whether or not the CCMA has jurisdiction to arbitrate such dispute.

9.8 What must the arbitrator do if the employer argues that despite the certificate indicating arbitration as the next step in dispute resolution, the Labour Court has jurisdiction and not the CCMA.

9.8.1 The categorisation of the dispute on the certificate has no bearing on whether the CCMA has jurisdiction to arbitrate. Whether or not the CCMA has jurisdiction depends on whether the referring party has alleged that the nature of the dispute is such that the CCMA has jurisdiction to arbitrate. If the arbitration proceeded on such basis and the evidence subsequently discloses that the nature of the dispute is not what the referring party had alleged it to be, a ruling to such effect must be made. It should then be left to the referring party to refer the dispute to the Labour Court, if that is the appropriate forum.

9.9 May a conciliator rescind a certificate once it has been issued to parties?

9.9.1 A commissioner cannot rescind a certificate once it has been issued.

9.9.2 Only an arbitration award and a ruling may be rescinded.

9.10 May more than one certificate be issued in respect of the same dispute?

9.10.1 Under no circumstance can the CCMA issue more than one certificate. Once a commissioner has issued a certificate he/she becomes *functus officio* and may not continue to conciliate except in terms of Section 150. The CCMA may also not appoint another commissioner to conciliate the dispute afresh if conciliation previously failed and a certificate to such effect was issued.

9.11 Can a dispute be arbitrated where a commissioner described a dispute of a single retrenched employee as a “dismissal based on the employer’s operational requirements” and indicated on the certificate that the next step after conciliation failed, is adjudication by the Labour Court?

- 9.11.1 Section 191 (12) of the LRA permits that when only one individual employee is dismissed for reasons related to the employer's operational requirements, following a consultation process that applied to one or more employees, the employee may elect to refer the dispute either to arbitration or to the Labour Court. The certificate does not dictate that the employee has to take the unresolved dispute to the Labour Court.
- 9.12 **Must a commissioner arbitrate where a certificate of outcome indicates an automatically unfair dispute but both parties consent that the dispute should be arbitrated at the CCMA?**
- 9.12.1 The dispute can be arbitrated if both parties agree to arbitration instead of Labour Court adjudication.⁶
- 9.12.2 Where no such agreement exists, the dispute must be adjudicated by the Labour Court.
- 9.13 **Should the commissioner commence arbitration where the respondent has already instituted review proceedings at the Labour Court to have the certificate of outcome set aside?**
- 9.13.1 An application for review of a certificate does not stay arbitration proceedings and a commissioner must proceed with the arbitration.⁷
- 9.14 **What must the arbitrator do where there is no certificate in the file and neither party can provide a copy of the certificate?**
- 9.14.1 An arbitrator must do the following –
- If there is proof on the file that 30 days has lapsed since the dispute was referred, the commissioner must continue to arbitrate.

⁶ Section 141(1)

⁷ The amended S158(1B) provides that the Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings before the issue in dispute has been finally determined by the Commission. There is however an exception if the Labour Court is of the opinion that it is just and equitable to review the interlocutory decision or ruling.

Chapter 10 : Settlement agreements

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- 10.10 May disputes about the interpretation or application of settlement agreements be referred to the CCMA for resolution?

10.1 What is a settlement agreement?

- 10.1.1 A settlement agreement is a written agreement signed by both parties in full and final settlement of a dispute that one of them had validly referred to the CCMA for resolution.

10.2 When can a settlement agreement be entered into?

- 10.2.1 A settlement agreement may be concluded during any proceeding at the CCMA, e.g a pre-con, a conciliation, a con-arb, or arbitration.

10.3 What is the effect of a settlement agreement?

- 10.3.1 If a settlement agreement was concluded between the parties, the dispute referred to the CCMA is resolved. A dispute over the interpretation or application of the settlement agreement is in effect a new dispute.

10.4 **What are important considerations when drafting a settlement agreement?**

10.4.1 When drafting the agreement, a commissioner must –

- Accurately record the case number;
- Accurately record the names of the parties;
- Record in writing the agreement in respect of each issue;
- State clearly who will do what, and by when, in respect of each issue;
- If possible, avoid the use of vague and ambiguous words, e.g. “soon”, “if reasonable”, and “if practical”;
- Use simple, clear, plain language and avoid the use of legal terms;
- Write in the active voice, e.g. “the employer will pay.....” and not “R3 000.00 must be paid.....”;
- Use language which implies agreement, e.g. “will” and not “must”;
- Be explicit;
- Use short sentences;
- Make the agreement a self-contained document (i.e. no references to other documents, if possible);
- Ensure that no party agrees to undertake anything, which is conditional upon the happening of an uncertain event;
- If it is necessary to refer to external criteria, ensure that they are objectively ascertainable;
- Clearly state the implementation date and where possible, specify the calendar date, e.g. “2 December 2014”, rather than leaving it to the parties to interpret, e.g. “3 weeks after signature”;
- Clearly state the date that the agreement is entered into;
- Ensure implementation is possible and realistic, i.e. that the agreement can be enforced;

- Provide for monitoring and enforcement if necessary; and
- Clarify and resolve any uncertainties with the parties.

10.5 What are the functions of a commissioner once the agreement has been drafted?

10.5.1 Ensure that the parties share a common understanding of the agreement, that they are committed to it and that there will be no disputes about its meaning by –

- Reading the agreement to them;
- Where necessary ensuring that the entire agreement has been read out and interpreted by an interpreter where necessary;
- Asking whether any clause needs clarification or amendment and amending the agreement appropriately if necessary;
- Explaining the agreement where necessary;
- Explaining the consequences of non-compliance with the agreement;
- Obtaining confirmation of the agreement;
- Asking an authorised representative of each party to sign the agreement in the presence of the other party and himself/herself; and
- Where appropriate, asking witnesses to sign.

10.5.2 If the parties agree that the settlement agreement may be made an arbitration award, it should be clarified in the agreement what the meaning of that is. If the parties unconditionally agree to the settlement agreement being made an arbitration award, the settlement agreement should be made an arbitration award immediately after the signing thereof. If the agreement is that the settlement agreement may only be made an arbitration award if one of the parties fails to comply with his/her/its obligations it should be clarified in the agreement that an application on notice would be required and that the settlement agreement may only be made an arbitration award if a finding is made that the other party had failed to comply with the agreement.

10.5.3 If a representative is signing on behalf of any party, enquire that the representative has the necessary authority to represent the party, and that the representative has obtained the consent from the party

to sign the agreement. An agreement entered into without authority is invalid.¹

10.5.3 Once the agreement is signed, a commissioner must –

- Keep the original document for the file;
- Hand a copy of the agreement to each party;
- Complete the outcome report;
- Complete the certificate of outcome and hand it to the parties; and
- Comply with any particular administrative requirements that the Case Management Officer might ask of commissioners from time to time.

10.6 Can a party pursue a dispute despite a settlement agreement?

10.6.1 An employee who unreservedly accepts the employer's settlement offer abandons his right to pursue the matter further.²

10.6.2 If a settlement agreement was concluded between the parties, this becomes a defence which can be raised if a party nevertheless proceeds with the dispute to arbitration. An application for review of the certificate of outcome is not the proper course of action in such circumstances.³

10.7 Is an amount payable in terms of a settlement agreement subject to tax?

10.7.1 An employer is obliged to deduct tax from the amount payable in terms of a settlement agreement, in accordance with a tax directive issued by SARS.⁴

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¹ See *Mavundla & others v Vulpine Investments Ltd t/a Keg & Thistle & others* [2000] 9 BLLR 1060 (LC). In *Kock & another v Department of Education, Culture & Sport of the Eastern Cape & others* [2001] 7 BLLR 756 (LC), the court held that a settlement agreement is invalid when it affects rights of third parties, where third parties have not had the opportunity to be heard.

² See *Naidu v Ackermans (Pty) Ltd* [2000] 9 BLLR 1068 (LC). In *Van As v African Bank Ltd* [2005] 3 BLLR 304 (W) the employer entered into a retrenchment agreement with the employee and then instituted disciplinary action against the employee. The court held that the disciplinary action was unlawful because the retrenchment agreement amounted to a compromise of the employer's right to institute disciplinary action.

³ See *Boshard Construction (Pty) Ltd v Building Industry Bargaining Council & others* [2002] 12 BLLR 1171 (LC).

⁴ In *Shellard Media (Pty) Ltd v Barnard* [2000] 11 BLLR 1359 (LC), the employer deducted income tax from the amount it agreed to pay the dismissed employee in a settlement agreement and paid over the balance to the employee. The court held that the employer was obliged to deduct income tax

10.7.2 It is advisable to provide in the settlement agreement for the time within which an application for a tax directive should be made and that the balance of the settlement amount (after deduction of tax, if any) should be paid within a specified time after receipt of the tax directive.

10.8 What should a commissioner consider in the event of an objection to the effect that a dispute was settled?

10.8.1 If a party raises the point that the dispute has been settled, the commissioner must consider the point.

10.8.2 The commissioner should consider the following-

- Whether the dispute, which was allegedly settled, is the same dispute as the dispute before the commissioner;
- Whether the agreement was in fact a settlement agreement;
- Whether the settlement agreement settled the dispute before the commissioner.⁵

10.9 What can be done if a party does not comply with a settlement agreement and how is it enforced?

10.9.1 Subject to section 142A (2) the CCMA may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the CCMA, an arbitration award.⁶

10.9.2 In terms of section 142A (2) the settlement agreements that may be made arbitration awards must relate to a dispute that a party has a right to refer to arbitration or to adjudication by the Labour Court provided that it excludes a dispute that a party is entitled to refer to arbitration in terms of either section 74 (4) or 75 (7). Settlement agreements relating to interest disputes may not be made arbitration awards.

10.9.3 The Labour Court has the power in terms of section 158(1) (c) to make a settlement agreement an order of the Court. It would only in

from the amount agreed and that the payment of the balance was in compliance with the agreement. See also *Eckhard v Filpro Industrial Filters (Pty) Ltd & others* [1999] 8 BLLR 804 (LC).

⁵ An agreement that the employer will pay the employee leave and other entitlements is, for example, not an agreement which resolves an unfair dismissal dispute. A statement that the employees accept severance benefits "in full and final settlement" is not necessarily sufficient to amount to a waiver of the employees' right to pursue an unfair dismissal dispute – *Roberts & others v WC Water Comfort (Pty) Ltd* [1999] 1 BLLR 33 (LC) and *NUM & others v Crown Mines Limited* [2001] 7 BLLR 716 (LAC).

⁶ Section 142A (1)

exceptional circumstances be necessary to approach the Labour Court, because if a settlement agreement has been made an award it may in any event be enforced as if it were an order of the Labour Court.

- 10.9.4 A settlement agreement that was made an award, which provides for the performance of an act, other than the payment of money, may be enforced by way of contempt proceedings instituted in the Labour Court.⁷
- 10.9.5 The enforcement of a settlement agreement is further dealt with in Chapter 19.
- 10.10 May disputes about the interpretation or application of settlement agreements be referred to the CCMA for resolution?**
- 10.10.1 A party may refer a dispute about the interpretation or application of a settlement agreement to the CCMA.⁸ This applies irrespective whether the settlement agreement is a collective agreement or not.⁹
- 10.10.2 A dispute over the interpretation of a settlement agreement exists when the parties disagree over the meaning of a particular clause(s).¹⁰
- 10.10.3 A dispute over the application of a settlement agreement exists when the parties disagree over whether the agreement applies to a particular set of facts or circumstances or when they disagree over the manner in which the settlement agreement should be applied. It does not include a dispute over whether the settlement agreement was complied with as such an issue must be determined during enforcement proceedings such as certification proceedings or contempt proceedings.¹¹
- 10.10.4 In terms of section 138 (9) the award may be in the form of a declaratory order.

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⁷ Section 143 (4)

⁸ Section 24 (8)

⁹ *Fidelity Security Services (Pty) Ltd v Beneker* Labour Court Case No (C933/2008)

¹⁰ See *NEHAWU / Department of Health Northern Cape Provincial Administration* [2005] 10 BALR 1056 (PSCBC). See also *NEHAWU / Department of Social Services and Population Development* [2005] 11 BALR 1140 (PSCBC)

¹¹ See *Public Servants Association /Provincial Administration Western Cape* [2001] 5 BALR 497 (CCMA)

Chapter 11: Request for arbitration, pre-arbitration Procedures and subpoenas

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11.21 What may be done if a witness, without good cause, fails to appear before the CCMA after being subpoenaed?

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11.1 When is a request for arbitration required?

11.1.1 A request for arbitration is required where there was an objection to con-arb or where the nature of the dispute is such that the con-arb procedure may not be invoked, a request for arbitration must be served on the other parties and filed with the CCMA after the dispute remained unresolved at conciliation.

11.2 When does the CCMA appoint a commissioner to arbitrate a dispute?

11.2.1 Once a dispute has been conciliated in terms of section 135, the CCMA must appoint a commissioner to arbitrate the dispute if -

- the LRA requires the dispute to be resolved through arbitration;
- a certificate of outcome has been issued stating that the dispute remains unresolved;
- any party files a valid request¹ for arbitration (where required); and
- the request for arbitration is filed within 90 days after the date on which the certificate was issued or a late request has been condoned (where applicable).
- Where the 30 day period allowed for conciliation had expired and there was a request for arbitration within 90 days.

11.3 How does a party request the CCMA to arbitrate a dispute

11.3.1 A request for arbitration (LRA Form 7.13) must be completed and filed with the CCMA. The LRA Form 7.13 must be fully and correctly completed.

11.3.1 The referring party or a person who in terms of the LRA or the Rules may represent such party, must sign the request in accordance with Rule 4.

11.3.2 The request for arbitration must be served on the other parties to the dispute in accordance with Rule 6.

¹ Rule 19

11.3.3 If the referral document is served out of time, the referring party must attach an application for condonation in accordance with Rule 9.3.~~and~~

11.3.4 The request for arbitration together with proof of service and any condonation application must be filed with the CCMA.

11.4 May the CCMA refuse to accept a request for arbitration which is not properly signed as required by Rule 4 or which is not accompanied by a condonation application (where required)?

11.4.1 In terms of Rule 18(3) of LRAA, the CCMA must accept a referral document but may not process the referral document until subrule (2) has been complied with.

11.5 What procedure should be followed in setting down an arbitration?

11.5.1 The parties must be given 21 days notice of the arbitration hearing and the days must be calculated in accordance with Rule 3 read with Rule 21.

11.5.2 Proof that the parties were given notice must be placed in the file so that the arbitrating commissioner can check that proper notice was given.

11.6 What is the purpose of a statement of case and the reply?

11.6.1 In exceptional cases the CCMA or a commissioner may direct the referring party to file a statement of case and the other party/parties to file an answering statement.²

11.6.2 The purpose is to discover what facts are common cause, what facts are in dispute and what issues must be decided. The purpose may also be to discover precisely what is alleged by the referring party in order to conclude whether the CCMA has jurisdiction to arbitrate.

11.6.3 It assists the parties to prepare for the arbitration and to decide in advance who should be called as witnesses.

11.7 What is a pre-arbitration conference?

11.7.1 A pre-arbitration conference is a meeting between the parties with the view of discovering what facts are common cause, what facts are in dispute and what issues must be decided, amongst other issues³

² Rule 19

³ Rule 20

- 11.7.2 The process also allows parties to exchange and view documents to be used at arbitration, to agree on the status of such documents and to decide what evidence is required and which witnesses should be called.

11.8 Who may direct that a pre-arbitration conference be held?

- 11.8.1 The parties to an arbitration must hold a pre-arbitration conference if directed to do so by the Convening Senior Commissioner, the Senior Commissioner in charge of the region or the Presiding Commissioner. They may also by agreement hold such a conference without such a directive.

11.9 When should a pre-arbitration conference be held?

- 11.9.1 If the facts or issues in dispute are complex.

11.10 What should take place if a dispute is settled during or as a result of the pre-arbitration conference and what if it is not settled?

- 11.10.1 The parties should draw up a settlement agreement if a dispute is settled and notify the CCMA of the settlement.

- 11.10.2 If not settled, the parties should draw up and sign a minute, setting out the facts that are common cause, the facts that are in dispute, the issues to be decided and any agreement regarding any other matter listed in 11.8 above.

- 11.10.3 While Rule 20 requires a copy of the pre-arbitration conference minute to be delivered to the appointed commissioner within seven days of the conclusion of the pre-arbitration conference, it is usual for the minute to be handed to the commissioner at the commencement of the arbitration.

- 11.10.4 While Rule 20 also allows the commissioner to direct the parties to hold a further pre-arbitration conference, this should only be done in very exceptional cases and if there is a good prospect that the proceedings will be curtailed as a result of it.

11.11 Are the parties bound by what is agreed or conceded in the pre-arbitration conference minute?

- 11.11.1 Parties are bound by what is agreed or admitted in the pre-arbitration conference minute⁴. Agreements limiting issues may only

⁴ See *Fuel Retailers Association of SA v Motor Industry Bargaining Council* [2001] 6 BLLRR 605 (LC) and *Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker and others* [1997] 12 BLLR 1632 (LC) at 1367- 1368

be retracted if there are proper recognised grounds for doing so and a proper application should be brought setting out the grounds.

- 11.11.2 In considering applications to allow further issues to be raised, commissioners should, *amongst others*, consider what the explanation is for not raising a particular issue at the pre-arbitration conference and the prejudice that the parties would suffer should the application be granted or not be granted.

11.12 What is a subpoena?

- 11.12.1 A subpoena is an order by a court or tribunal that commands the presence of a witness to testify or produce specific evidence, under penalty for failure.

- 11.12.2 In the CCMA context the common types of subpoenas are-

- those ordering a witness to attend a hearing in order to give oral evidence; and
- those ordering a person to bring physical evidence such as books and documents to an arbitration and to produce it to the arbitrator.

11.15 When is a subpoena necessary?

- 11.15.1 A subpoena is generally necessary when a party requires relevant testimony or evidence in the form of oral evidence, a book, document or object from a person, but the person is unwilling to voluntarily appear at the arbitration hearing to provide the evidence to the arbitrator.

11.16 Who may issue a subpoena and in what form must it be issued?⁵

- 11.16.1 A subpoena may be issued by the CCMA prior to the scheduled date of the hearing or by a commissioner who has been appointed to attempt to resolve a dispute.⁶

- 11.16.2 The Director is required to sign subpoenas⁷ but the Director has delegated this function to –

- Convening Senior Commissioners;
- Acting Convening Senior Commissioners;

⁵ See Practice Note 3 of 2011

⁶ Section 142

⁷ Section 142(3)

- Senior Commissioners in charge of a region.

11.16.3 Subpoenas must be in the form of LRA Form 7.16.

11.17 What are the requirements that must be met for a subpoena to be issued?⁸

11.17.1 The party requesting the subpoena must complete and file the prescribed Form 7.16 together with a written motivation setting out why it is necessary that the person to be subpoenaed attend.

11.17.2 The completed Form 7.16 together with the motivation must be filed at least 14 days prior to the scheduled date or as directed by the commissioner hearing the matter.

11.17.3 The party requesting the subpoena must pay the prescribed witness fees and the reasonable travel costs and subsistence expenses of the person to be subpoenaed or request that, and give reasons, why the CCMA must waive the requirement to pay such fees and costs in terms of section 142(7)(c). Proof that the witness fees and reasonable travel costs, and subsistence expenses have been paid must be attached to the completed Form 7.16 when filed with the CCMA.

11.17.4 A ruling on the application to waive the requirement to pay the witness fees and reasonable travel costs, and subsistence expenses must be issued in writing and handed to the requesting party together with the subpoena.

11.18 When must an application for a subpoena be made?

11.18.1 An application for a subpoena must be made 14 or more days before the date of the hearing.

11.19 By whom and how must a subpoena be served?

11.19.1 The subpoena must be served on the witness by the party requesting the subpoena or by the sheriff 7 days before the scheduled date of the hearing. Proof of service of the subpoena must be retained and provided to the arbitrator at the arbitration.

11.19.2 A subpoena must be served in accordance with regulation 3 of the Labour Relations Regulations, i.e. -

- by delivering a copy of it to the person subpoenaed personally;

⁸ See Practice Note 3 of 2011

- by sending a copy of it by registered post to the subpoenaed person's residential address, place of business or employment or post office box or private bag number; or
 - by leaving a copy of it at the subpoenaed person's residence or place of business or employment, with a person who apparently is at least sixteen years of age and is residing or employed there.
- 11.19.3 If a witness is required to appear on a further date a new subpoena must be issued or the commissioner may warn the witness to appear on such future date if he/she is in attendance at the hearing on the date specified in the original subpoena.
- 11.20 Can an arbitrating commissioner, acting on his/her own accord, subpoena a witness?**
- 11.20.1 Yes. If in the course of a hearing the commissioner believes that the evidence of a specific person is necessary, such person may be subpoenaed by the commissioner. The subpoena must however be signed by the Director or his/her delegate.
- 11.21 Who pays the witness fees and travel and subsistence expenses and what fees are payable?**
- 11.21.1 The witness fees and reasonable travel costs, and subsistence expenses are paid to the witness by the party requesting the subpoena as required by section 142 (7) (b) unless the payment of witness fees and the costs has been waived by the CCMA in terms of section 142 (7) (c).
- 11.21.2 If the witness fees and payment of the costs have been waived or if the commissioner decided to subpoena a witness, then the witness fees and reasonable substantiated travel costs and subsistence expenses shall be borne by the CCMA as provided by sections 142 (7) (a) and (c).
- 11.21.3 The fees payable to a witness are regulated by Regulation 4 of the Labour Relations Regulations and is the total of the following -
- R200-00 for each day or part of a day that the witness is required to be present at any proceedings; and
 - Reasonable substantiated travel and subsistence expenses incurred by the witness to be present at the proceedings.
- 11.21.4 In terms of Regulation 4 (2) no witness fee may be paid to a person who, at the time of the relevant proceedings, is employed full-time by the State, or is a member of a legislature mentioned in the Constitution.

11.22 What may be done if a witness, without good cause, fails to appear before the CCMA after being subpoenaed?

- 11.22.1 In terms of section 142 (8) (a), when subpoenaed, a failure to appear without good cause, is contempt of the CCMA and the commissioner may make such finding and refer it to the Labour Court for an appropriate order.
- 11.22.2 Contempt of the CCMA is further dealt with in Chapter 22.

11.23 What procedure is to be followed when CCMA staff members are subpoenaed?

- 11.23.1 Where a staff member, full-time or part-time commissioner or a full-time or part-time interpreter is subpoenaed such member, commissioner or interpreter may not refuse to accept service of the subpoena.
- 11.23.2 If a subpoena is served on any of the persons referred to in the preceding paragraph, a copy of the subpoena must be handed to such person's line manager immediately, who in turn must notify the Convening Senior Commissioner of the region or where there is no Convening Senior Commissioner, the Commissioner in charge of the region.
- 11.23.3 A copy of the subpoena as well as a summary of the reasons why the evidence of such person is required must be forwarded to the Office of the NSC: Legal Services within 48 hours of service.
- 11.23.4 The NSC: Legal Services will consider the reasons why the evidence of such person is required and if appropriate liaise with the party who requested the subpoena to find a way to dispose of the issue which requires the evidence of such person without the need to testify.
- 11.23.5 If no agreement is reached, the line manager of the subpoenaed staff member, commissioner or interpreter must make the necessary arrangements for that person to attend the proceedings at the time, date and venue as set out in the subpoena and remain present until excused by the presiding commissioner, the court or other presiding officer, as the case may be.

Chapter 12 : Arbitrations

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- 12.19 Consolidation of Claims in an unfair discrimination disputes

12.1 When may an arbitration be conducted?¹

- 12.1.1 If the dispute is one that the LRA or another act requires the CCMA to arbitrate.
- 12.1.2 If the dispute remained unresolved after conciliation. (A certificate of non-resolution is proof of thereof).
- 12.1.3 Where no certificate has been issued, and 30 days have expired since the CCMA has received the referral and the dispute remains unresolved.
- 12.1.4 Where necessary, (where there is an objection to con/arb or the dispute is one that cannot be set down for con/arb), a request for arbitration has been received by the CCMA within 90 days of the date on which the certificate of non-resolution was issued or if no certificate has been issued, within 90 days of the date on which the 30 day conciliation period has expired.
- 12.1.5 If applicable, the request for arbitration has been served properly on the other party and filed with the CCMA.
- 12.1.6 If the arbitration was not timeously requested, the late request has been condoned.
- 12.1.7 All parties have been notified of the set down.

12.2 May a con-arb referral or request for arbitration be withdrawn, how must it be done and what is the effect of such withdrawal?

- 12.2.1 The referring party may withdraw the referral or the request for arbitration at any time after the referral or the request was made.
- 12.2.2 A referring party should not be unduly influenced to withdraw a referral for conciliation or a request for arbitration. If reality testing is done during conciliation the negative as well as the positive scenarios must be sketched².
- 12.2.3 A withdrawal of a referral or request for arbitration will only be regarded as final if certain procedures have been complied with³.
- A referral or dispute can be withdrawn by the referring party either at conciliation or arbitration⁴. A withdrawal of a referral or

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¹ Section 136 and 191

² See *Kasipersad v CCMA & others [2003] 2 BLLR 187 (LC)*

³ Practice Note 2 of 2011

dispute will only be final if the parties have completed the attached settlement agreement to withdraw the dispute and the following process has been complied with.

- The parties must complete the attached settlement agreement to withdraw the dispute and sign it in the presence of the CSC/delegated senior commissioner/ commissioner dealing with the dispute at a remote venue after having telephonically consulted with the CSC or delegated senior commissioner.
- The CSC/delegated senior commissioner/commissioner dealing with the dispute at a remote venue must explain the consequences of the withdrawal to the employee, namely, that the employee will not be able to re-refer or re-open the dispute once the withdrawal is in a form of a settlement agreement.
- It must be ensured that the employee understands what the consequences of the withdrawal is.

A. In disputes where only the employee is present-

- i.) The employee must complete the attached notice of withdrawal form and sign it in the presence of a CSC/delegated senior commissioner/commissioner dealing with the dispute at a remote venue after having telephonically consulted with the CSC or delegated senior commissioner.
- ii.) The same process set out in 1.2 and 1.3 must be followed.
- iii.) The withdrawal of a referral or the dispute by an employee either at conciliation or arbitration does not bar an employee from re-referring the same dispute to the CCMA provided the withdrawal is not made in a form of a settlement agreement.⁵ The re-referral must however be accompanied by an application for condonation if it is made outside the time frames prescribed in the applicable labour legislation.

B. In disputes where both the employee and the employer are present

- i.) the parties must complete the prescribed settlement agreement and sign it in the presence of the Convening Senior Commissioner or delegated Senior Commissioner, or Commissioner dealing with the dispute at a remote venue after

⁴ See in this regard *Ncaphayi v CCMA and others* (2011) 32 ILJ 402 (LC); *Kgobokoe v CCMA and others* (2012) 33 ILJ 235 (LC), *Lemley v CCMA* [2013] ZALCPE 7 (17 April 2013), *SAMWU and others v CCMA and Another* [2013] ZALCJHB 303 (21 November 2013).

⁵ See in this regard *Ncaphayi v CCMA and others* above at para 28.

having telephonically consulted with the Convening Senior Commissioner or delegated Senior commissioner; and

- ii.) the Convening Senior Commissioner or delegated Senior Commissioner, or Commissioner dealing with the dispute at a remote venue must explain the consequences of the withdrawal to the employee and ensure that the employee understands what the consequences of the withdrawal are.

12.2.4 The explanation referred to in the preceding paragraphs must be interpreted (where necessary).

12.2.5 The procedure referred to above need not be followed if the party effecting the withdrawal is represented by a legal representative or by a union official or an official from an employer's organisation, as the case may be, and such representative informed the commissioner in front of the other party that the referral for conciliation or the request for arbitration is withdrawn. In such instances the proceedings involving the withdrawal must be recorded and the party requesting the withdrawal must be required to place on record what the reasons for the withdrawal are. It must at all times be ensured that a representative withdrawing a referral or request for arbitration has a mandate to do so.

12.2.6 If the referring party notifies the CCMA by post or by fax of the withdrawal, the withdrawal must only be accepted-

- if the referral or request that is being withdrawn is clearly identified in the notice; and
- if the notice was signed by the referring party or his duly authorised representative.

In such event the CMO must immediately notify the other parties in writing of the withdrawal.

12.2.7 The consequences of a valid withdrawal is that it brings the dispute in respect of which the referral or the arbitration request was made finally to an end and the party who withdrew the dispute may not refer it to the CCMA again or request the CCMA to arbitrate the dispute again.

12.2.8 If the matter was already scheduled for con-arb or arbitration and the other party/parties have consented to the matter being removed from the roll, the matter must be removed from the roll.

12.3 In what manner may an arbitration be conducted?

- 12.3.1 An arbitrator has a discretion to determine the manner in which an arbitration is conducted⁶.
- 12.3.2 Generally an arbitrator may opt for an inquisitorial approach or an adversarial approach to the arbitration.
- 12.3.3 An inquisitorial approach is where the arbitrator adopts the role of finding the facts and determining the probabilities by questioning witnesses and requiring the parties to produce documentary and other forms of evidence that may lead to a fair and quick determination of the dispute.
- 12.3.4 An adversarial approach is where the parties are primarily responsible for calling witnesses and presenting their evidence and cross-examining the witnesses of the other parties.
- 12.3.5 Irrespective of the approach adopted an arbitrator must conduct the arbitration impartially and must not engage in conduct that might reasonably give rise to a party forming a perception that the arbitrator is biased.⁷
- 12.3.6 It is advisable that the decision on the form of the arbitration be taken after the parties have gone through the process of narrowing the issues and were given an opportunity to address the arbitrator on the form in which the arbitration should be conducted.
- 12.3.7 The arbitrator must advise the parties of the decision and explain the process decided upon to the parties, particularly the powers of the arbitrator and procedure to be followed.

12.4 What factors should be considered in deciding on the form of the arbitration?⁸

- 12.4.1 When making the decision on the form of the arbitration, the arbitrator should consider –
- the complexity of the factual and legal matters involved;
 - the attitude of the parties to the form of proceedings;
 - whether the parties are represented;

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⁶ Section 138 (1) of the LRA

⁷ See *Sasol Infrachme v Daniel and Others [2014] ZALAC 54 and Chabalala v Metal and Engineering Industries Bargaining Council and others [2014] 3 BLLR 237 (LC)*

⁸ See CCMA Arbitration Guidelines: Misconduct Arbitrations

- whether legal representation has been permitted; and
 - the experience of the parties or their representatives in appearing at arbitrations.
- 12.4.2 The manner in which the arbitrator decides to conduct the arbitration must allow each party to the dispute to exercise the following rights⁹
- Give evidence.
 - Call witnesses.
 - Question witnesses.
 - Address concluding arguments.
- 12.4.3 An inquisitorial approach should generally be adopted when the parties are inexperienced. Even relatively experienced representatives may experience problems when the factual and legal issues are complex and in such cases it would also be appropriate to adopt an inquisitorial approach.
- 12.4.4 Where both parties are represented by legal practitioners it would generally be more appropriate to adopt an adversarial approach.
- 12.4.5 Although an arbitrator may adopt a range of techniques to expedite the resolution of an arbitration, the arbitrator must not seek to expedite an arbitration in a manner that restricts the parties' rights or that is unfair or unreasonable.
- 12.4.6 The arbitrator should not allow technicalities to prevent the full picture of events being placed before the arbitrator¹⁰.
- 12.4.7 Where the parties agree that an adversarial approach should be adopted their views should generally be respected.
- 12.4.8 Even if an adversarial approach is adopted an arbitrator may question witnesses to ascertain the substantial merits of the dispute. In such circumstances the arbitrator must allow the parties to ask questions on the issues raised by the arbitrator.
- 12.4.9 Under no circumstances should an arbitrator be aggressive or intimidating or disrespectful when questioning witnesses. Witnesses should only be interrupted if the circumstances require it.

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⁹ Section 138 (2) of the LRA

¹⁰ For example, in appropriate cases an arbitrator may permit hearsay evidence to be admitted if this is necessary to obtain the full picture of the events in the case. See *Naraindath v CCMA & others (2000) 21 ILJ 1151 (LC) ;[2000] 6 BLLR 911(LC)*

12.5 What is the nature of an arbitration?

- 12.5.1 An arbitration is a new hearing, which means that the evidence concerning the reason for the employer's decision (which is challenged or in dispute) is heard afresh. The arbitrator must consider the fairness of the employer's decision on the evidence admitted and submissions made at the arbitration.

12.6 What stages are followed in arbitrations?

- 12.6.1 please refer to the CCMA Guidelines: Misconduct Arbitrations as amended

12.7 What should be done if an arbitration is part-heard and the arbitrator becomes unable to conclude the arbitration hearing?

- 12.7.1 In terms of section 133 read with section 136 of the LRA the CCMA may appoint another commissioner to arbitrate a dispute if the commissioner who was originally appointed is unable to conclude the arbitration. The consent of the parties is not required.
- 12.7.2 Whenever a commissioner is appointed to arbitrate a matter that was part heard before another commissioner, the matter should start *de novo* unless the parties come to a different agreement.
- 12.7.3 When an arbitration commences *de novo*, earlier rulings made by a previous arbitrator relating to the merits of the case, such as a ruling narrowing the issues, are not binding on the arbitrator hearing the matter afresh.¹¹
- 12.7.4 Any prejudice that a party may suffer as a result of a *de novo* hearing must be considered and the arbitrator should adopt a practical approach. For example, if a witness is no longer available, the arbitrator should consider whether to admit evidence given by the witness at the previous hearing, particularly if the other party had a proper opportunity to cross-examine the witness during those proceedings.
- 12.7.5 Once an award was issued the CCMA has no power to appoint another commissioner to arbitrate unless the award is set aside on review.

12.8 Arbitrations *in camera*

- 12.8.1 Although arbitration is an open process, an arbitrator has the discretion, on application, to make an order that the process or part

¹¹ See *Sondolo IT (Pty) Ltd v Howes & others* [2009] 5 BLLR 499 (LC)

thereof must be conducted *in camera*. This normally happens when the safety of a witness is in danger, because of intimidation or where it would be prejudicial to the parties or one of them or not in the public interest that the information which will become available during the arbitration becomes known to outside persons (sensitive evidence).

- 12.8.2 The applicant party has to lay a basis by making submissions and adducing evidence to convince the arbitrator that such an order should be granted.
- 12.8.3 The other party should be given an opportunity to oppose the application, which may include allowing evidence to rebut the allegations of the applicant party,
- 12.8.4 After hearing both parties the arbitrator should consider the submissions and the evidence led and decide to either dismiss or grant the application on any condition which the arbitrator may deem appropriate in the circumstances. These conditions must be clearly spelt out in the order.
- 12.8.5 The arbitrator need not give reasons for the ruling at the time of the decision (unless the arbitrator is in a position to do so) provided that the reasons are contained in the final award.
- 12.8.6 If for practical reasons the arbitration cannot continue immediately after the application was heard, the proceedings must be adjourned to a later date. In such a case it is advisable that the arbitrator reserves his/her decision and makes it available to the parties together with brief reasons as soon as possible, and gives direction as to the process that has to be followed as a result of the ruling.
- 12.8.7 A ruling that the arbitration or part thereof must be conducted in camera may include the following terms-
- The arbitration will be conducted *in camera*;
 - The evidence of the witness (referred to as Mr X) will be heard *in camera*;
 - The representative of the applicant party, Mr Themba Koza, may be present and participate in the proceedings when the evidence of Mr X is dealt with;
 - The applicant may not be present and the identity of Mr X may not be disclosed to the applicant or any outside person during or after the arbitration proceedings;
 - The respondent and its representative may be present when the evidence of Mr X is dealt with;

- The arbitrator will continue at a time, date and place to be determined by the CCMA in conjunction with the applicant's representative, Mr Themba Koza, the respondent and the arbitrator;
- The evidence of Mr Ben Payne will be heard *in camera* and the contents of his evidence may not be published or disclosed to any outside person;
- The evidence regarding the respondent's process of developing an auto catalyst will be heard *in camera* and may not be published or disclosed to any outside person.

12.8.8 Where an application for evidence to be led *in camera* is brought in order not to disclose the identity of the witness it is practice to adopt a three-tier approach¹²-

- Firstly, the party bringing the application should be given an opportunity to lead evidence of an objective nature (including hearsay evidence) in an open hearing, to show that there is a real or bona fide belief in the minds of the persons giving evidence that the potential witness(es), who are seeking anonymity, have a real and genuine fear for their safety and to make submissions to why the witness(es) should be allowed to give evidence *in camera* as to why they have such fear for their safety. The other party should also be afforded an opportunity to lead evidence and make submissions about this issue. At the end of this phase the commissioner should rule whether or not the witness (es) seeking anonymity should be allowed to give evidence *in camera* as to the fear that they have for their safety.
- Secondly; the party bringing the application should be given the opportunity of calling the witness(es) seeking anonymity themselves, *in camera*, to give evidence including evidence of a subjective nature concerning their fears for their safety and the grounds therefor. The other party should be given an opportunity to lead rebutting evidence. At the end of this phase and after hearing the submissions of the parties, the commissioner should make a ruling whether or not the witnesses seeking anonymity would be allowed to give their evidence on the merits *in camera*. In considering whether to make such a ruling the commissioner must *inter alia* consider the prejudice that the parties would suffer should such a ruling be made or not be made.
- Thirdly; if a ruling is made that the evidence of the witness (es) may be heard *in camera* the party seeking to call the witness (es) is allowed to call them to give evidence in the presence of only the persons specified in the ruling.

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¹² NUM & others v Deelkraal Gold Mining Co Ltd [1994] 7 BLLR 97 (IC)

12.9 Consolidation of claims in an unfair discrimination dispute

- 12.9.1 There are instances where more than one dispute may be referred that emanates from unfair discrimination e.g. where the applicant alleges that he was demoted, eventually dismissed after he complained about sexual harassment from the supervisor. The disputes should be consolidated and the arbitrator should attempt to determine all the disputes based on the same set of facts. Only in exceptional circumstances should the disputes be arbitrated separately.

Chapter 13: Admissibility and evaluation of evidence

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- 13.1 What is the arbitrator's duty with regard to evidence?
- 13.2 What party begins giving evidence?
- 13.3 Evidence in arbitration hearings
- 13.4 Relevant evidence
- 13.5 Oral evidence
- 13.6 Subpoenas
- 13.7 Documentary evidence
- 13.8 Expert evidence
- 13.9 Direct and circumstantial evidence
- 13.10 Hearsay
- 13.11 Similar fact
- 13.12 Privilege
- 13.13 Parol evidence rule
- 13.14 How is evidence evaluated?

13.1 What is the arbitrator's duty with regard to evidence?

- 13.1.1 In terms of section 138 of the LRA, the arbitrator should allow the parties to give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.
- 13.1.2 The arbitrator should explain the above to parties at the commencement of the arbitration, particularly to those who have not attended an arbitration before.

13.2 Which party begins giving evidence?

- 13.2.1 There is no statutory duty, but generally the party who bears the onus of proof begins.
- 13.2.2 Where the dispute concerns whether an employee was dismissed, the employee must begin because the employee bears the onus.

Where the dispute concerns the fairness of the employee's dismissal, the employer bears the onus and should begin leading evidence first.

- 13.2.3 If a dispute concerns an alleged unfair labour practice the party who alleges the unfair labour practice should begin leading evidence first. This applies to other disputes as well. The general rule is that the party who alleges must prove its case, and therefore lead evidence first.
- 13.2.4 If in the view of the arbitrator it is practical for the party who does not bear the onus to begin, the arbitrator may make a ruling to such effect. The views of the parties should, however, be carefully considered before such a ruling is made and it should only be done in exceptional circumstances.

13.3 Evidence in arbitration hearings

- 13.3.1 Evidence may be given by witnesses [oral evidence], and parties may rely on documents [documentary evidence], and other evidence such as video recordings, photographs, breathalysers and so on.

13.4 Relevant evidence

- 13.4.1 While it is the duty of each party to lead evidence to establish their case, arbitrators are duty bound to draw the attention of unrepresented parties to evidence they should lead.
- 13.4.2 The general rule is that only evidence, which is relevant, should be led. Relevance is determined with reference to the issues in dispute. In an arbitration the issues in dispute are usually narrowed at the commencement of the arbitration, or limited at a pre-arbitration conference.

13.5 Oral evidence

- 13.5.1 Oral evidence is verbal evidence given personally by a witness.
- 13.5.2 Witnesses to arbitration should be sworn in before they testify, or affirm that they will tell the truth (if the witness has an objection against taking the oath or does not regard the oath as binding on his/her conscience).
- 13.5.3 Arbitrators should administer the oath as follows: "Do you have any objection to taking the oath?" If the witness answers in the negative, the arbitrator should ask: "Do you consider the oath to be binding on your conscience?" If the response is in the affirmative, the oath should be administered as follows: "Do you swear that the evidence you will give shall be the truth, the whole truth and nothing but the truth? Please say, so help me God".

- 13.5.4 Arbitrators should administer the affirmation as follows: “Do you affirm that the evidence you will give shall be the truth, the whole truth and nothing but the truth? Please say, I do so affirm”.
- 13.5.5 It is good practice to explain the procedure, which will follow, i.e. that the witness will make a statement, and that once that is completed the witness will be cross-examined by the representative of the other party and then re-examined again by the representative of the party who called the witness. If an interpreter is present it is also good practice to ask the witness to pause after each sentence and wait for the interpreter to interpret what is said.
- 13.5.6 Arbitrators have the right and the duty to ask witnesses questions in order to ensure that they understand the evidence given by the witness and to enable them to determine where the probabilities lie.
- 13.5.7 Opinion evidence is inadmissible unless given by an expert, in which event, it should first be established that the witness is in fact an expert.
- 13.5.8 Character evidence is also inadmissible, unless a witness places his/her character in issue by leading evidence regarding his/her reputation.
- 13.5.9 A witness is not entitled to give evidence by reading a prepared statement, unless the parties have agreed to this.
- 13.5.10 As a general rule a witness should not be present in the arbitration when another witness is giving evidence, where the former is called to corroborate the evidence of the latter because it affects the probative value of the evidence of the witness. Save in exceptional circumstances, an arbitrator should excuse the witnesses at the commencement of the proceedings whereafter they should be called one by one to testify. If a representative of a party is also a witness he/she should be required to give his/her evidence first.

13.6 Subpoenas

- 13.6.1 Subpoenas are dealt with in more detail in Chapter 11.

13.7 Documentary evidence

- 13.7.1 Documents normally form an important part of the evidence at arbitration hearings. It is good practice to ask parties to hand in documents, which they intend relying on at the commencement of the arbitration. There should be sufficient copies for the arbitrator, the witness, the employee party and the employer party and each page in

the bundles of documents should be numbered consecutively in the same way.

- 13.7.2 Once the bundle/s of documents are handed in and exchanged, the arbitrator should enquire the evidentiary status of each document, i.e. whether it is admitted by the parties or whether it is in dispute. If a document is disputed, evidence must be led that the document is what it purports to be and that the contents of the document are correct and accurate. If a document is admitted, neither of these factors are in dispute.
- 13.7.3 Documents which are in dispute and relevant need to be proven by oral evidence and unrepresented parties should be warned that this should be done.

13.8 Expert evidence

- 13.8.1 Expert evidence is admissible opinion evidence. An expert witness is someone who has specialised knowledge and skills and who will assist the arbitrator to understand the nature of evidence and to draw valid conclusions from the evidence.
- 13.8.2 In terms of Rule 37A parties should give each other notice of its intention to call an expert together with a summary of the evidence to be given by such expert and the basis on which the witness is regarded to be an expert at least seven (7) days prior to the hearing to enable the other party to consider the summary and obviate the need for postponement.
- 13.8.3 It is practice to allow an expert witness to listen to the evidence of an expert called by the other party to enable the former to comment on the evidence of the latter.

13.9 Direct and circumstantial evidence

- 13.9.1 Direct evidence proves a fact directly and is admissible if it is relevant.
- 13.9.2 Circumstantial evidence proves a fact indirectly and such evidence is admissible if tendered to prove a relevant fact. An inference should only be drawn if it is consistent with the proven facts and is the most probable inference, which may be drawn from the facts.

13.10 Hearsay evidence

- 13.10.1 Hearsay evidence is given when a witness testifies to or about what another person told him/her about what he/she had seen or experienced.

13.10.2 Hearsay evidence is admissible if the other party admits the evidence, if the originator will be called to testify or if the arbitrator is of the opinion that the evidence should be admitted in the interests of justice. When considering whether it is in the interests of justice to admit hearsay evidence the arbitrator should consider the following factors:

- The nature of the proceedings.
- The nature of the evidence.
- The purpose for which it is tendered.
- The probative value of the hearsay evidence.
- The reason why the evidence is not given by the person on whose credibility its probative value depends.
- The prejudice to a party which admission of such evidence may entail.
- Any other factor which should in the opinion of the arbitrator be taken into account.

13.11 Similar fact evidence

13.11.1 Similar fact evidence is evidence that a person has done something previously, which is led with a view to argue that an inference should be drawn that the person has done the same thing again. Such evidence is normally irrelevant and therefore inadmissible.

13.11.2 Similar fact evidence which is led with a view of establishing a pattern of behaviour justifying an inference regarding the identity of the perpetrator of an act, may be relevant and admissible.

13.12 Privilege

13.12.1 A witness may not be required to testify to or about matters which are privileged, such as, confidential communications between the witness and the attorney of the party who called the witness or statements made during conciliation or without prejudice settlement negotiations.

13.13 Parol evidence rule

13.13.1 This rule applies to collective agreements and contracts. The rule is that the document speaks for itself, and the meaning and intention of the parties should be determined from the collective agreement or contract itself. Parties are therefore not permitted to lead oral evidence about what they intended the agreement to mean, save

where it is tendered to determine the true nature of the relationship between an applicant and an alleged employer.

13.14 How is evidence evaluated?

- 13.14.1 The degree or extent of proof required is a balance of probabilities. Even a strong suspicion is not sufficient to prove the substantive guilt of an employee.¹
- 13.14.2 This means that once all the evidence has been tendered, the arbitrator must weigh up all the evidence as a whole and determine what version is more probable. It involves findings of facts based on an assessment of credibility and the probabilities, and an assessment of the applicable rules in the light of those findings in order to come to a conclusion.
- 13.14.3 An arbitrator must weigh up the evidence as a whole, taking into account the following factors².
- Probabilities
 - Reliability
 - Credibility
- 13.14.4 Determining probabilities requires the arbitrator to assess the probabilities and improbabilities of each version on each of the disputed facts and then determine which is the most probable version is. In the process the nature or type of the evidence should be considered, for example, whether it is direct, hearsay, expert, opinion, etc. Direct evidence is more reliable than hearsay evidence. Opinion evidence is not reliable, unless it is the opinion of an expert. At the end it involves weighing the factors that point in one direction against those that point in another direction.
- 13.14.5 The **credibility of** a witness would *inter alia* depend on the witness' candour and demeanour in the witness box. In this regard it is relevant to consider for example whether the witness –
- answered the questions in a logical and straightforward manner;
 - attempted to avoid answering questions;
 - was unable/reluctant to answer questions that he/she should have knowledge of;
 - exaggerated his/her version;

¹ *Mbanjwa v Shoprite Checkers (Pty) Ltd and others (DA4/11) [2013] ZALAC 29 (7 November 2011)*

² *See Sasol Mining (Pty) Ltd v Ngqeleni NO & others (2011) 32 ilj 723 (LC)*

- gave evidence or made concessions favourable to the other party e.g. that he/she did not observe everything;
- gave evidence or made concessions not favouring the case of the party who called the witness;
- failed to make concessions that he/she can be expected to make;
- implicated himself/herself and admitted culpability;
- in the witness box behaved in a manner that impacted negatively on his/her credibility e.g. by looking down when answering questions or by becoming aggressive when cornered;
- became emotional in circumstances where that was to be expected, and on
- the calibre and cogency of his/her performance compared to that of other witnesses testifying about the same incident or events.

13.14.6 The **credibility and reliability** of a witness will *inter alia* depend on-

- the witness' bias, latent and blatant e.g. whether the witness has a reason or motive to lie;
- internal contradictions in the evidence of the witness,
- external contradictions with what was pleaded or put on behalf of the witness, and
- the probability or improbability of particular aspects of his version.

13.14.7 The **reliability** of a witness will also depend on -

- the opportunities the witness had to experience or observe the event in question and
- the quality, integrity and independence of his/her recall thereof.

CHAPTER 14: Awards

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- 14.1 What are the arbitrator's obligations with regard to issuing an award?
- 14.2 What is the difference between an award and a ruling?
- 14.3 How should the procedural fairness of a dismissal for misconduct be approached?
- 14.4 How should the substantive fairness of a dismissal for misconduct be approached?
- 14.5 How to approach remedies?
- 14.6 How should evidence be assessed and how should the award be drafted?
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- 14.8 Issue/s in dispute
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- 14.17 When and how are awards to be filed?
- 14.18 How are applications for extension of the time period for filing awards to be processed?
- 14.19 What is the effect of an award being issued?
- 14.20 Vetting of awards

14.21 Costs and enforcement of awards

14.1 What are the arbitrator's obligations with regard to issuing an award?

- 14.1.1 A typed arbitration award must be issued within 14 days of the conclusion of the arbitration proceedings and to enable this to be done, the arbitrator must supply the CCMA with such an award within 10 days of the conclusion of the arbitration proceedings¹.
- 14.1.2 In terms of the CCMA Language Policy the award must be in English.
- 14.1.3 The award must contain brief reasons but all the issues in dispute during the arbitration must be dealt with.
- 14.1.4 The award must be signed by the arbitrator².
- 14.1.5 In writing the award the arbitrator must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the CCMA in accordance with the provisions of the LRA, that is relevant to a matter being considered in the arbitration proceedings³.
- 14.1.6 Judgments of the Labour Court, Labour Appeal Court, the Supreme Court of Appeal and the Constitutional Court must be considered as binding authority⁴.
- 14.1.7 The award must be one that the arbitrator is empowered to make. The arbitrator may make any appropriate award in terms of the LRA, including but not limited to, an award-
- that gives effect to a collective agreement;
 - that gives effect to the provisions and primary objects of the LRA;
 - that includes, or is in the form of, a declaratory order⁵.
- 14.1.8 The award must be clear as vague awards are unenforceable⁶.

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¹ See section 138 (7). The Director may however extend the 14 day period.

² In *Meyer v CCMA & another* [2002] 2 BLLR 186 (LC) the court held that an award is a nullity until signed by the arbitrator.

³ Section 138 (6). The Code of Good Practice: Dismissal, must, for example, be taken into account.

⁴ See *Le Roux v CCMA & others* [2000] 6 BLLR 680 (LC) at 667-668

⁵ Section 138 (9). In *Superstar Herbs v Director CCMA & others* [1999] 1 BLLR 58 (LC) and *Bargaining Council for the Electrical Industry KwaZulu Natal v Industrial Electrical Company (Pty) Ltd* [2000] 5 BLLR 570 (LC)

⁶ For example the amount of back pay payable in terms of a re-instatement award must be quantified.

- 14.1.9 The purpose of providing brief reasons is to explain to the parties why the award was made and to indicate to them that the commissioner has performed the function that the LRA requires an arbitrator to perform. In the event of a review the reasons should indicate to the reviewing judge that the award was one that a reasonable arbitrator could make and should not indicate that there was a defect in the arbitration proceedings.
- 14.1.10 The reasons should in particular indicate to the parties:
- that the commissioner applied his/her mind to the issues in dispute;
 - that the commissioner considered the evidence and argument of the parties relating to the issues in dispute;
 - that the commissioner made findings in respect of all the issues in dispute;
 - what the reasons were for making each one of such findings;
 - that the commissioner took into account any relevant code of good practice issued by NEDLAC or guidelines issued by the CCMA;
 - that it was within the commissioner's powers to make the award;
 - that the commissioner followed binding judgments of the Labour Court, Labour Appeal Court, the Supreme Court of Appeal and the Constitutional Court;
 - that the award is reasonable ¹.

14.2 What is the difference between an award and a ruling?

- 14.2.1 An award deals with the merits of the dispute, is always issued after all the evidence is heard and brings the dispute finally to an end.
- 14.2.2 Only certain rulings bring the matter to an end, e.g. rulings refusing to grant condonation of a late request for arbitration, rulings to the effect that the CCMA does not have jurisdiction and, in unfair dismissal cases, rulings that no dismissal occurred. Unlike awards, such rulings do not deal with all the issues in dispute.

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¹ See *SAMWU v South African Local Government Bargaining Council & others* [2014] 7 BLLR 711 (LAC)

- 14.2.3 Other rulings relate to interlocutory issues, such as, whether or not to grant an adjournment, whether or not to allow legal representation in dismissal disputes relating to conduct or capacity, whether or not to admit certain evidence or whether or not the arbitrator should recuse himself/herself¹. Rulings granting condonation of a late request for arbitration and rulings that the CCMA has jurisdiction, also fall in this category. Such rulings do not deal with all the issues in dispute, do not bring the dispute finally to an end and require further evidence to be led or further findings to be made before the dispute is brought to an end.
- 14.2.4 Review proceedings relating to rulings dealing with interlocutory issues will generally only be entertained by the Labour Court once the arbitration proceedings are completed.
- 14.3 How should the procedural fairness of a dismissal for misconduct be approached?²**

Introduction

- 14.3.1 If a dismissal is not automatically unfair, it is unfair if the employer fails to prove that the reason for the dismissal is a fair reason, and that the dismissal was effected in accordance with a fair procedure³.
- 14.3.2 When arbitrators decide whether a dismissal was procedurally fair, reference must be made to the CCMA Guidelines: Misconduct Arbitrations as amended.
- 14.4 How to approach the substantive unfairness of a dismissal for misconduct.**
- 14.4.1 Please refer to the CCMA Guidelines: Misconduct Arbitrations as amended.
- 14.5 How to approach remedies for unfair dismissals and unfair discrimination disputes?**
- 14.5.1 For remedies for unfair dismissals, reference should be made to the CCMA Guidelines: Misconduct Arbitrations as amended.
- 14.5.2 How to approach remedies of unfair discrimination cases

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¹ See *KwaZulu Natal Transport (Pty) Ltd v Mnguni* [2001] 7 BLLR 770 (LC) at 71

² See *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 ILJ 1644 (LC) ; (2006) 9 BLLR 833 (LC)

³ See section 188

- 14.5.2.1 At the conclusion of arbitration, the arbitrator may order any appropriate award that gives effect to the provisions of the EEA. Such award may include damages¹, compensation², reinstatement, re-employment or instatement³; or any order directing the employer to take steps to prevent the same unfair discrimination or a similar practise from occurring in the future in respect of employees.⁴
- 14.5.2.2 The remedies under the EEA should not be confused with the remedies under the LRA. Compensation in the unfair discrimination cases is ordered for non-patrimonial loss and the breach of the right to equality, dignity and the right not to be discriminated against, whereas in the LRA compensation is ordered for patrimonial and non-patrimonial loss. Damages in these cases are ordered to address actual patrimonial loss⁵ and the loss must be proved in evidence.
- 14.5.2.3 The arbitrator should inform the parties of all available remedies and briefly explain the meaning and how they are ordered at the commencement of the proceedings.
- 14.5.2.4 In the event of failure of the applicant to include a claim for damages or compensation in the referral form, the claim may be introduced at the commencement of arbitration and be placed on record.
- 14.5.2.5 Arbitrators must move away from common law concepts of special and general damages, etc. and use terms "compensation", "damages" and "just" and "equitable"⁶.
- 14.5.2.6 In calculating compensation, the point of departure should be what is just and equitable⁷ in the circumstances.

14.5.3 Compensation in terms of EEA

- 14.5.3.1 Compensation is intended to remedy the breach of a statutory right. It is akin to *solatium* for non-patrimonial loss, injury to dignity, and to compensate for unfair treatment.

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¹ Section 48 of the EEA

² Section 50(2) (a) of the EEA

³ See *Hoffmann v South African Airways (2000) 12 BLLR 1365*

⁴ Section 50(2)(c)

⁵ *South African Airways (Pty) Ltd v G.J.J.V.V and another (CA9/13, CA420/2006) [2014] ZALAC 27; [2014] 8 BLLR 748 (LAC)*

⁶ See *Hoffmann v South African Airways (2000) 12 BLLR 1365*

⁷ Section 50(2)

14.5.3.2 Compensation should not be calculated on a certain number of months' remuneration as this suggest that a lower income earner's right to equality is valued lower than that of a higher income earner.

14.5.4 Damages

14.5.4.1 The damages to be ordered are capped at the BCEA threshold¹. The cap applies irrespective of whether the arbitration takes place as a result of an election by an employee who earns less than threshold or whether the parties agreed to arbitration.

14.5.4.2 Damages is intended to address the patrimonial loss, including future loss for example loss of future income which must be proved through evidence.

14.5.5 An order directing the employer to take steps

14.5.5.1 Arbitrators are advised to make an order directing the employer to take steps to prevent the same unfair discrimination or similar practise occurring in the future in respect of other employees.

14.5.6 Reinstatement, re-employment and instatement

14.5.6.1 The EEA does not make provision for ordering of reinstatement or re-employment. It may, however, be ordered if appropriate and if a continued employment relationship is practicable. It is very likely that an order of reinstatement may be accompanied by an order directing the employer to take steps to prevent the same unfair discrimination or similar practise from occurring in future.

14.5.6.2 There is no cap to retrospective payment but it cannot be ordered for a period preceding the date of dismissal. Arbitrators must use their discretion when deciding on the extent of retrospectively.²

14.5.6.3 The arbitrator must clarify the retrospective payment when ordering reinstatement.

14.5.7 How should an award directing the employer to take steps be worded in EEA

¹ Section 48 (2) of EEA

² *Equity Aviation Services (Pty) Ltd v CCMA (2008) ILJ 2507 CC*

- 14.5.7.1 The following may be appropriate: The employer, ABC (Pty) Ltd, is directed to introduce a policy against racial discrimination and sexual harassment, and to ensure that every employee is made aware of the policy.
- 14.5.7.2 The following is a competent award in sexual harassment cases: The employer, ABC (Pty) Ltd, is directed to transfer Ms Daniele Smit from IT Department to Human Resources Department on similar terms and condition of employment.
- 14.5.7.3 The following is a competent award to address unequal pay for work of equal value: The employer, ABC (Pty) Ltd, is directed to grade or re-grade all Human Resources Officers' positions within two months of the date of this award, and to ensure that the evaluated positions are adjusted accordingly within one month of the regarding exercise having been finalised.
- 14.5.7.4 The following is competent with regards to the policy that discriminates: The employer, ABC (Pty) Ltd is directed revise its Recruitment and Selection Policy to ensure that it does not unfairly discriminate against the disabled and pregnant women and to remove all the discriminatory clauses within two months of the date of this award.

14.6 How should evidence be assessed and how should the award be drafted?

14.6.1 The arbitrator should organise the award along the following lines –

- Details of the hearing and representation must be supplied;
- The nature of the dispute and issues to be decided should be indicated;
- The background to the dispute should be explained;
- A summary of the evidence and argument must be given;
- The evidence and argument must be analysed and it must be indicated what the conclusions were;
- The factors relevant to the relief should be analysed and the relief should be determined;
- The relief awarded must be clearly set out.

- 14.6.2 The assessment of the evidence commences in the explanation of the background, continues in the summary of the evidence and is finalised in the analysis.
- 14.6.3 The paragraphs must be numbered consecutively.

14.7 Details of the hearing and representation.

- 14.7.1 In this section the nature of the arbitration and the dates on which it was held should be dealt with. The parties to the dispute and their representatives should be identified. The status of the representatives and the right of the parties to be represented by them should be explained.
- 14.7.2 The following is an example -

Details of hearing and representation

1. This is the award in the arbitration between Ms A.B. Mkhize, the employee, and ABC (Pty) Ltd, the employer.
2. The arbitration was held under the auspices of the CCMA in terms of section 191(5) (a) of the Labour Relations Act, 1995 as amended ("the Act ") and the award is issued in terms of section 138 (7) of the Act.
3. The arbitration hearing took place on 29 May 2009 at the CCMA in Durban.
4. The employee was present and was represented by an official of her union, Mr E. Mchunu.
5. The employer was represented by Mr Ngubane, a director.

14.8 The nature of the dispute and the issues to be decided

- 14.8.1 The results of the process during which the issues were narrowed must be recorded in this section. It must be indicated what the dispute is about and what the issues are.
- 14.8.2 The following is an example -

Issue/s to be decided

6. The dispute is whether the dismissal of Ms Mkhize was substantively and procedurally unfair.

7. In regard to the substantive fairness of the dismissal, the issues are whether Ms Mkhize committed misconduct on 18 March 2009 by misappropriating equipment belonging to the company as well as whether the sanction of dismissal was unfair.
8. The procedural issue is whether Ms Mkhize was afforded an opportunity to state a case in response to the allegations.
9. The relief to be awarded is also in issue.

14.9 The background to the dispute

14.9.1 Background facts should set the scene and contain the facts that may be important in the analysis later in the award. Background facts should focus on the following -

- *The parties.* These facts describe the parties to the dispute. If applicable the question whether a trade union is a party to the dispute or a representative of the employee should, *inter alia*, be dealt with.
- *The workplace.* These facts should include the sector, the nature of the work, the size of the workplace and any special considerations that may flow from this. So, for example, a mine may have special requirements as to discipline and safety.
- *Procedures and agreements.* These facts should include the rules governing the regulation of conduct in the workplace, such as, disciplinary codes, disciplinary procedures and collective agreements.
- *The employment relationship.* These facts are specific to the employee, such as, the contract of employment, length of service, duties, remuneration at dismissal and disciplinary record and date of dismissal.
- *The history of the dispute.* These facts should summarise the events leading up to the dispute, the dispute itself, the pre-dismissal procedure, the referral of the dispute to the CCMA and any procedural history such as the outcome of conciliation.
- *The relief sought.*
- *The conduct of the arbitration.* Facts that are specific to the conduct of the arbitration should be set out. It should deal with representation (if not already dealt with), the dates of the hearing,

reasons for delays, applications and rulings concerning the arbitration.

The degree of detail will depend on the importance that any of these facts may have on the assessment of the evidence later in the award.

14.9.2 A example is as follows -

Background to the dispute

10. Ms Mkhize was employed as a packer in the employer's supermarket for three years and earned R. per week.
11. On 18 March 2008 Ms Mkhize's bag was searched when she left the company premises and equipment belonging to the employer was found inside her bag. At the time Ms Mkhize contended that she did not put the equipment in her bag and that she had no knowledge how it got there.
12. A disciplinary enquiry was held on 20 March 2009 and at the conclusion of it Ms Mkhize was dismissed.
13. She referred a dispute to the CCMA the following day.
14. A conciliation meeting was held on 18 April 2009 but the dispute remained unresolved and a certificate to such effect was issued.
15. On 19 April 2009 Ms Mkhize requested that the dispute be resolved through arbitration.

14.10 Survey of the evidence and argument

- 14.10.1 In this section the arbitrator should provide a summary of the evidence. Normally the evidence should be referred to in the order that it was given or chronologically.
- 14.10.2 The summary of the evidence should record the relevant evidence. Evidence material to the dispute must be identified and dealt with. A mere repetition of the evidence of the witnesses should be avoided and irrelevant evidence should not be mentioned.
- 14.10.3 Documentary evidence should be summarised.
- 14.10.4 It is best not to deal with issues of credibility or probability at this stage. The purpose of this section of the award is to record as accurately as possible the relevant parts of the evidence for the purposes of the analysis.
- 14.10.5 The survey does not have to deal with all the detail that may be necessary for the purpose of analysis later in the award. The

evidence may be referred to in more detail in the analysis itself. The same applies to the parties' closing arguments.

14.10.6 The following is an example:-

Survey of evidence and argument

16. Mr Ngubane was the chairperson of the disciplinary enquiry. He testified that Ms Mkhize was given an opportunity to make a statement dealing with the allegations against her. Her defence at the disciplinary enquiry was that somebody else must have framed her by putting the equipment inside her bag without her knowing about it. No witness was called to testify during the disciplinary meeting because the applicant admitted that the equipment was found in her bag.
17. Mr Thulani Zuma was the security guard who discovered the equipment in the applicant's bag. On his version the equipment was hidden under some clothing.
18. The only witness to testify in support of the applicant's case was the applicant herself. She denied putting the equipment in her bag or that she knew that it was in her bag when she was leaving the company premises. She disputed that the equipment was hidden and testified that it was on top when the bag was opened. She denied that she was given an opportunity to state a case during the disciplinary meeting. On her version she was merely told that she was dismissed because the company did not have time for thieves.
19. In his closing argument Mr Ngubane submitted that the dismissal was not unfair and that the applicant should not be awarded any relief.
20. Ms Mkhize argued that the dismissal was unfair. She sought reinstatement with back pay.

14.11 Analysis of evidence and argument

- 14.11.1 This section of the award involves a determination of the relevant facts for the purpose of coming to a decision on the fairness of the reason for the dismissal as well as the procedure followed in effecting the dismissal. It involves findings of fact based on an assessment of credibility and the probabilities and an assessment of the applicable rules in the light of those findings. The arbitrator must provide reasons for the findings.
- 14.11.2 Prior to the analysis of the evidence and argument the following should already have been done

- the main issue should have been identified;
 - the background to the main issue should have been described highlighting in the process what the underlying factual issues are;
 - in the survey of the evidence and argument a brief summary of the evidence of the witnesses of each party in relation to the underlying factual issues should have been given;
 - a brief summary of the argument advanced by the parties in respect of the underlying issues should also have been given in the survey; and
 - the relief sought by the parties should have been indicated at the conclusion of the survey of evidence and argument.
- 14.11.3 If the issues referred to in the preceding paragraph had not been dealt with earlier in the award it should be dealt with in the analysis of the evidence and argument.
- 14.11.4 Generally the analysis should first concentrate on resolving the factual issues. It would normally be convenient in cases involving dismissal for misconduct to deal with these factual issues by reference to the issues referred to in Item 7 of the Code of Good Practice: Dismissal i.e.
- whether there was a rule or standard and, if so, whether the rule or standard was contravened;
 - whether the rule or standard was reasonable;
 - whether the employee was aware or could reasonably have been expected to have been aware of the rule or standard;
 - whether the rule or standard has been consistently applied by the employer; and
 - whether dismissal was an appropriate sanction for a contravention of the rule or standard.
- 14.11.5 If the facts relating to some of the issues mentioned in the preceding paragraph are common cause then this should be recorded in the award and the remaining issues should be concentrated on.
- 14.11.6 In most instances the crucial issue would be whether the rule or standard was contravened and this would involve make a finding as to the version that is to be believed. There are two possible scenarios:

- The employer party may rely on **direct evidence** implicating the employee party in the CCMA of the alleged misconduct. In this regard a finding would have to be made whether or not the employer proved on a balance of probabilities that its version of events is more probable than the version of the employee party. If not, the employee party's version would have to be accepted and a further issue would then be whether the employee party's version together with other established facts did not prove the CCMA of the misconduct.
 - In certain cases the employer party may rely on **circumstantial evidence** to prove that the employee party committed the alleged misconduct. In such cases a finding would first have to be made what facts were proved on a balance of probabilities. Thereafter a finding would have to be made whether the most probable inference to be drawn from such facts is that the employee party committed the alleged misconduct.
- 14.11.7 The scenarios referred to in the preceding paragraph may exist in respect of each of the issues referred to in paragraph 7 of the Code and the process referred to in the preceding paragraph would then have to be followed in respect of each disputed issue.
- 14.11.8 There could be various reasons why an arbitrator believes the version of one witness above that of another. The reasons why the version of the one party is preferred above the version of the other party should be set out in the reasons for the award. The arbitrator should consider a number of factors such as their
- credibility;
 - reliability; and
 - the probabilities¹.
- 14.11.9 Each issue in dispute should be dealt with by summarising the evidence applicable to that issue, making factual findings and giving reasons for such findings.
- 14.11.10 In making factual findings the arbitrator must weigh the evidence as a whole taking account of the following factors-
- *The probabilities.* This requires a formulation of the contending versions and a weighing up of those versions to determine which is the more probable. The factors taken into account must be identified and the findings in regard to the probabilities must be justified.

¹ See *Sasol Mining (Pty) Ltd v Ngqeleni NO & others (2011) 32 ILJ 723 (LC)*

- *The reliability of the witnesses.* This involves an assessment of the following-
 - the extent of the witness' first hand knowledge of the event;
 - any interest or bias that a witness may have;
 - any contradictions or inconsistencies;
 - corroboration by other witnesses; and
 - the credibility of the witness, including demeanour.
- 14.11.11 The conclusions drawn from the facts must be set out and reasons for drawing such conclusions must be given. Where applicable, the disciplinary code of the employer, the applicable legal principles and the relevant provisions of the LRA and Code of Good Practice: Dismissal, should be referred to.
- 14.11.12 The finding in respect of each issue must be clearly set out, e.g. in dismissal disputes it should be indicated what the finding is in respect of substantive fairness as well as procedural fairness where both issues were in dispute.
- 14.11.13 In dealing with the **probabilities** it is not sufficient to merely find in the reasons for the award that one version is regarded as more probable than the other or that a particular fact is the most probable inference to be drawn. Reasons for such findings must be provided.
- 14.11.14 The conclusions drawn from the facts must be set out and reasons for drawing such conclusions must be provided. Where applicable the disciplinary code of the employer, the applicable legal principles and the relevant provisions of the LRA and the Code of Good Practice: Dismissal, should be referred to.
- 14.11.15 Where relief is awarded the reasons for awarding the relief including the extent of the relief should be set out. Reasons for not awarding reinstatement and, where applicable, for the amount of compensation should in particular be provided. It should be indicated to what extent relevant factors were taken into account and what role it played in determining the relief including, where applicable, the amount of back pay or the amount of compensation. A failure to do so may justify an inference that the commissioner did not exercise a proper discretion which amounted to misconduct constituting a reviewable irregularity.¹
- 14.11.16 Where relief is awarded, the reasons for awarding the relief including the extent of the relief should be set out.
- 14.11.17 Where applicable, it should be explained how back pay or compensation was calculated.

¹ See *Mohlakoana v The Commissioner, CCMA & others* (unreported Labour Court Case No JR 284/09)

14.11.18 The following is an example -

Analysis of evidence and argument

21. In respect of the substantive fairness of the dismissal it was common cause that it constituted misconduct for an employee to misappropriate company property by removing it from the company premises without authority.
22. It was further common cause that equipment belonging to the company was in the applicant's bag when she attempted to leave the company premises and that she had no authority to remove it from the company premises.
23. Whether the applicant committed the alleged misconduct depends on whether she was aware that the equipment was in her bag when she attempted to leave.
24. There was a factual dispute whether the equipment was concealed under some clothing. The version of Mr Zuma, the security guard, was more probable than that of Ms Mkhize for the following reasons:
25. I therefore find that the equipment was concealed under some clothing.
26. The most probable inference to be drawn from the fact that the equipment was concealed was that it was done to avoid detection during a search. It is therefore improbable that somebody tried to frame the applicant and it is more probable than not that it was Ms Mkhize herself who put the equipment in the bag.
27. The most probable inference is that Ms Mkhize was aware that the equipment was in her bag when she attempted to leave the company premises and in view thereof that she had no authority to remove it, she committed the misconduct that she was later dismissed for.
28. The misconduct was serious in that it involved dishonesty which caused a breakdown of the trust relationship. The employer's disciplinary code prescribed the sanction of dismissal for such misconduct and the Code of Good Practice: Dismissal, in Item 3 (3) thereof, recognises that the sanction of dismissal is fair and appropriate in such circumstances. It was not unfair for the employer to have dismissed Ms Mkhize for such misconduct.
29. The employer accordingly proved on a balance of probabilities that it had a fair reason for dismissing Ms Mkhize.

30. Regarding the procedure, it was in dispute whether the applicant was afforded an opportunity to state a case in response to the allegations against her. Mr Ngubane's version was more probable than that of Ms Mkhize for the following reasons:
31. I therefore find that the applicant had an opportunity to state a case in response to the allegations against her.
32. The applicant did not raise other issues relating to the fairness of the procedure and the procedure followed by the employer is recognised as a fair procedure in terms of Item 4 (1) of the Code of Good Practice: Dismissal.
33. The employer accordingly proved on a balance of probabilities that it followed a fair procedure in effecting the dismissal of Ms Mkhize.

14.12 Award

- 14.12.1 The parties should be identified in the award.
- 14.12.2 The award should clearly and accurately set out the relief awarded.
- 14.12.3 The award must be enforceable.
- 14.12.4 If the award requires action from a party it should be specified by when such action must be taken.
- 14.12.5 If reinstatement is awarded it must be specified from when the reinstatement is effective, i.e. whether it is effective from the date of dismissal or a later date.
- 14.12.6 The amounts payable in terms of the award should be accurately quantified. How the calculation was done should be explained in the analysis and only the amount payable should be mentioned in the award.

14.13 How should an award for re-instatement be worded?

- 14.13.1 A re-instatement award with retrospective effect should be worded as follows-
 - (a) The employer, ABC (Pty) Ltd is ordered to re-instate the employee, Ms Anne Mkhize in its employ on terms and conditions no less favourable to her than those that governed the employment relationship immediately prior to her dismissal.

- (b) The re-instatement in paragraph (a) is to operate with retrospective effect from _____ (insert date of dismissal or later date, whichever is applicable).
- (c) As at the date of the award the remuneration due to Ms Mkhize as a result of the retrospective operation of the re-instatement, amounted to (insert amount) minus such deductions as the employer is in terms of the law entitled or obliged to make.
- (d) The amount referred to in paragraph (c) is to be paid to Ms Mkhize within fourteen days of the employer being notified of this award.
- (e) Ms Mkhize is to tender her services to the employer within 48 hours of becoming aware of the award.

14.13.2 A re-instatement award with no retrospective effect should be worded as follows:

- (a) The employer, ABC (Pty) Ltd is ordered to re-instate the employee, Mr John Jones, in its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal.
- (b) The reinstatement referred to in paragraph (a) is to operate with effect from the date of issuing of this award.
- (c) Mr Jones is to tender his services to the employer within 48 hours of being notified of this award.

14.13.3 A commissioner does not have the power to award re-instatement as well as compensation and care should be taken not to confuse back pay with compensation. If re-instatement is not awarded with retrospective effect no back pay is payable.

14.14 How should an award for the payment of compensation be worded?

14.14.1 The following is a competent award for the payment of compensation -

- (a) The employer, ABC (Pty) Ltd is ordered to pay Ms Anne Mkhize the sum of R -----.
- (b) Payment of the amount referred to in paragraph (a) must be effected by paying the said amount into Ms Mkhize's bank account with the following particulars:

Account Holder:

Bank:
Branch:
Branch Code:
Account No:

- (c) The payment referred to in paragraph (b) is to be effected within fourteen days of the employer being notified of this award.

14.15. How should an award for promotion be worded?

14.15.1 The following is a competent award for promotion -

- (a) The employer, ABC (Pty) Ltd, is ordered to promote Anne Mkhize, to the level of Grade (insert grade) and to pay her the remuneration and benefits applicable to that grade.
- (b) The promotion referred to in paragraph (a) shall operate with retrospective effect from (insert date).
- (c) As at the date of this award the additional remuneration and benefits due to Ms Mkhize as a result of the retrospective operation of the promotion, amounts to (insert amount) minus such amounts as the employer is in terms of the law obliged or entitled to deduct.
- (d) The amount referred to in paragraph (c) is to be paid to Ms Mkhize within fourteen days of the employer being notified of this award.

14.16. How should an award setting aside a warning or suspension or an award of organisational rights be worded?

14.16.1 The following is a competent award for setting aside a warning -

- (a) The final written warning issued to the applicant on (insert date) is set aside.

14.16.2 The following is a competent award for setting aside a suspension –

- (a) The decision to suspend the employment of the applicant, (insert name), communicated to the applicant on (insert date) is set aside.
- (b) The employer party (insert name) is order to reinstate the terms and conditions of employment governing the employment of the applicant and to pay him the remuneration and afford him the other benefits of employment with retrospective effect from (insert date) as if his employment was never suspended.

- (c) As at the date of issuing of this award the remuneration due to the applicant as a result of the retrospective reinstatement referred to in the preceding paragraph amounts to (insert amount) minus such deductions as the employer party is in terms of the law obliged or entitled to make.
- (d) The remuneration referred to in the preceding paragraph must be paid to the applicant within fourteen days of the employer party being notified of this award.
- (e) The applicant is to tender his services to the employer party withing 24 hours of this award coming to his attention

14.16.3 The following is a competent award for granting organisational rights –

- (a) Subject to paragraphs (b) to (e) below the respondent, (insert name of respondent), is directed to recognise (insert name of the union) ("the union") as a representative union as well as a majority union in its workplace and to afford the union the organisational rights envisaged by sections 12, 13, 14 and 15 of the LRA.
- (b) Any office bearer or official of the union is entitled to enter the respondent's premises during the lunch break of the respondent's employees
 - to recruit members, or
 - to hold meetings with and/or to communicate with members and/or to otherwise serve their interests; or
 - to hold an election or ballot as envisaged by section 12 of the LRA, provided that 24 hours written notice is given to the respondent prior to the exercise of such rights.
- (c) As envisaged by and subject to the provisions of section 13 of the LRA the respondent must
 - deduct trade union subscriptions as soon as possible after receiving a written authorisation to do so from any employee who is a member the union;
 - continue to make the deductions until such time as the authorisation is revoked with proper notice (provided that the deduction must be made until the notice period has expired);

- remit the amount deducted to the union by no later than the 15th day of the month following the date each deduction was made; with each monthly remittance, provide the information and documents envisaged by section 13 (5) including details of the employees from whose wages deductions were made,
- details of the amounts deducted and remitted, and the period to which the deductions relate.

(d) As envisaged by and subject to the provisions of section 14 of the LRA union members employed by the respondent are entitled to elect from amongst themselves at least one trade union representative (“shop steward”) as well as an alternate to act as shop steward in the absence of the elected shop steward and the respondent must allow the elected shop steward or, where applicable, the alternate shop steward

- to perform the functions mentioned in section 14 (4);
- to take _____ hours per month off with pay for the purposes mentioned in section 14 (5).

(e) As envisaged by and subject to the provisions of section 15 of the LRA the respondent must allow union office bearers in its employ

- to take _____ days paid leave per annum for the purposes mentioned in section 15 (1).

14.16.4 The relief referred to in paragraph (d) of the preceding subparagraph may only be granted to a majority union and the number of shop stewards that may be elected depends on the number of union members employed by the employer. The example must be adapted to suit the particular circumstances of the case.

14.17. When and how must awards be filed?

14.17.1 Awards must be issued within 14 (fourteen) days of the date of completion of the arbitration. However, to allow for the award to be perused and to be captured by the CCMA, CCMA policy requires that arbitrators file their awards with the CCMA no later than the 10th day following the last day of the hearing.

14.17.2 The award must be delivered to the CCMA within the specified period by e-mail or on computer disc.

14.17.3 A typed hard copy of the award signed by the arbitrator must be placed in the file and the file returned to the CCMA no later than the 10th day after the last day of the hearing.

- 14.17.4 Applications for the extension of time for filing of awards must be made on the prescribed form to the Director of the CCMA. Such applications must at the latest be made before the expiry of the 10 day period and forwarded to the relevant provincial CSC.
- 14.17.5 If the application for extension is granted the Director will extend the 14 day period within which the award is to be issued. That does not mean that the commissioner have until the end of the extended period to file the award with the CCMA. The award must be filed with the CCMA more than four days prior to the end of the extended period to enable vetting and capturing to be done timeously.
- 14.17.5 Late awards are an embarrassment to the CCMA and may result in disciplinary action being taken against full-time commissioners. Late awards may jeopardise future work for part-time commissioners and will incur financial penalties.
- 14.18 How are applications for extension of the time period for filing awards, to be processed?**
- 14.18.1 The application must be made on the prescribed form and all the information on the form must be correct. (The form is found under “public folders” under the heading Application for extensions.)
- 14.18.2 If extensions are required for more than one case, a separate application form must be completed for each case.
- 14.18.3 The application for extension must be handed or faxed to the delegated staff member, no later than the tenth day following the finalisation of the arbitration hearing.
- 14.18.4 The delegated staff member must capture the application for extension on the case management system and tick the appropriate block on the application form to confirm that it was done.
- 14.18.5 The hard copy of the application form must be submitted to the provincial CSC for recommendation and signature.
- 14.18.6 Once the provincial CSC has signed the application form it must be submitted to the Director for consideration. This is done by faxing it to the Director’s secretary to enable her to submit it to the Director.
- 14.18.7 The processing of the application is done by a delegated staff member. Should commissioners fax their applications to the Director themselves, they should ensure that the application is first captured on the case management system and that the hard copy is signed by the provincial CSC before the faxing is done.

- 14.18.8 The application for extension must be faxed to the Director's secretary by the end of the thirteenth day after the finalisation of the arbitration hearing.
- 14.18.9 Once the Director has approved or refused the application, a case note to such effect will be recorded on the case management system and the hard copy will be faxed back to the provincial office for the commissioner to be informed whether or not the application was granted.
- 14.18.10 In deciding whether to approve an application for extension the Director will consider the following factors:
- the reasons advanced for requesting an extension;
 - whether the parties consented to an extension;
 - the duration of the arbitration hearing and the anticipated length of the award;
 - the complexity of the factual and legal issues to be decided;
 - the importance of the case;
 - whether circumstances beyond the control of the commissioner rendered it impossible for the award to be filed with the CCMA within ten days;
 - any history of applications by the same commissioner for extension to be granted in other cases.
- 14.18.11 If the Director has approved the extension of the period for issuing the award the delegated staff member in the provincial office must notify the parties of the extension and of the new date when the award will be issued.
- 14.18.12 Save in highly exceptional circumstances only one application for extension per case is allowed. When applying for extension commissioners should ensure that they apply for sufficient time so as to be able to file the award with the CCMA more than four days prior to the end of the extended period.

14.19 What is the effect of an award being issued?

- 14.19.1 Once an award, ruling or certificate has been issued, the CCMA and arbitrator is *functus officio* as far as that process is concerned. Unless it is an award or ruling capable of being rescinded as contemplated by section 144 of the LRA, any aggrieved party's remedy lies with a review application to the Labour Court.

14.20 Vetting of awards/rulings

- 14.20.1 Within ten days of the finalisation of the arbitration hearing the arbitrator must deliver the award/ruling to the responsible case management officer (CMO) or to a person delegated by the CCMA, under cover of a duly completed certificate of perusal.
- 14.20.2 The arbitrator must deliver the award to the CMO or other delegated person either by e-mail or on a disc in a manner and format that is accessible to the CCMA.
- 14.20.3 The CMO must capture the award on the case management system ("CMS") immediately after receiving it from the arbitrator (i.e. on the same day). The CMO must further check that the certificate of perusal was correctly completed and in particular, that the date that the award was handed to the CCMA, is correctly reflected on the certificate.
- 14.20.4 Immediately after capturing the award on the CMS, the CMO must hand the award to the vetting commissioner for perusal.
- 14.20.5 After perusal, the CMO must "final confirm" the award on the CMS, if no corrections are necessary.
- 14.20.6 If corrections are necessary, the award must be returned to the arbitrator within 24 hours. The arbitrator must file the corrected award within 24 hours. The CMO must correct the award on the CMS and then "final confirm" on the CMS.
- 14.20.7 The arbitrator must sign the final approved award and copies of the signed award must be sent to the parties.
- 14.20.8 The vetting commissioner must check that the award was timeously submitted and, if not, must report the matter to the CSC or delegated person, for further action.
- 14.20.9 The vetting commissioner must further check the following and require the arbitrator to correct the award, if necessary-
 - that the format is correct;
 - that the parties are correctly cited;
 - that the award does not contain typing, spelling and grammatical errors;
 - that there is no obvious incorrect reasoning;
 - that the arbitrator followed relevant Codes of Good Practice and binding court judgments;

- that the arbitrator took into account the Arbitration Guidelines;
- that the award took into account any relevant sectoral determination; and
- that the award is clear and enforceable.

14.20.10 Where it is appropriate to do so, vetting commissioners should coach arbitrators with a view to assist them to improve their writing skills.

14.20.11 Vetting commissioners should further be guided by the Vetting Guidelines issued by the CCMA.

14.21 Costs and Enforcement of Awards

See the applicable Chapters.

Chapter 15: Applications

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- 15.22 Applications for postponement
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15.1 What applications may be decided on affidavit?

15.1.1 A number of preliminary or interlocutory applications may be decided on affidavit and without the need to hear oral evidence. These include-¹

- applications for condonation, joinder, substitution, variation, rescission; and postponement
- applications relating to jurisdictional objections; and
- other preliminary or interlocutory applications, such as, applications for legal representation to be allowed, applications to correct the citation of a party, applications for consolidation of hearings or applications for a senior commissioner to be appointed.

15.2 What documents must be filed before an application may be processed?

15.2.1 In all applications the applicant must file the following-²

- a notice of application;
- a founding affidavit;
- confirmatory or supporting affidavits (if necessary);
- a schedule listing the documents that are material and relevant (if necessary); and
- proof of service on the respondent(s).

15.3 What must the applicant's application papers contain?

¹ Rule 31 (1)

² Rule 31

15.3.1 There are minimum requirements for application papers and an applicant should be required to comply with these requirements before the application papers are accepted for processing. The requirements are-³

- the notice of application must be signed by the applicant or a person entitled to represent the applicant;
- the notice of application must specify the case number allocated (if one has been allocated);
- the relief sought must be stated;
- the respondent must be advised in the notice of application that if it intends to oppose the matter, it must deliver a notice of opposition and an answering affidavit within 5 days⁴ after receipt of the notice of application and that if it fails to do so, the application may be heard in its absence;
- the application must be accompanied by an affidavit by the applicant setting out the names, description, addresses and fax numbers of the parties, a statement of material facts on which the application is based and any legal issues to be considered;
- supporting and confirmatory affidavits, where applicable, must be attached to the founding affidavit;
- The party initiating the proceedings may deliver a replying affidavit within three 3 days⁵ from the day on which any notice of opposition and answering affidavit are served on it.
- In exceptional cases a commissioner may permit an affidavit to be substituted by a written statement.⁶

15.4 What should further be contained in the application papers if the application is filed outside a prescribed time period?

15.4.1 If an application is filed outside a prescribed time period, it is not necessary for a separate condonation application to be filed.

15.4.2 It must be indicated in the notice of application that condonation of the lateness is sought and the grounds on which condonation is sought, must be dealt with in the founding affidavit.⁷

³ Rule 31 (3)

⁴ Rule 31 (5)(a)

⁵ Rule 31 (6) (a)

⁶ Rule 31 (7)

⁷ Rule 31(4) (d) read with Rule 9

15.5 What should further be contained in the application papers if the application is brought on an urgent basis, i.e. where it is not possible to give the respondent party the required notice or to file the required affidavit?

15.5.1 In such circumstances it should be indicated in the notice of application that a ruling would be sought from the commissioner dealing with the matter, that the requirements of the rules relating to the time frames within which the application had to be brought or, where applicable, the requirements of any other rule, be dispensed with.

15.5.2 In the founding affidavit the applicant should explain the circumstances rendering the matter urgent and the reasons why the matter cannot be dealt with in accordance with the time frames prescribed in the rules, or (where relevant) why the other provisions of the rules could not be complied with.

15.6 What are the requirements for opposing an application?

15.6.1 In order to oppose an application a respondent must within five days from the day on which the application was served on it, file the following⁸

- a notice of opposition;
- an answering affidavit;
- confirmatory or supporting affidavits (if necessary);
- a schedule listing the documents that are material and relevant (if necessary); and
- proof of service on the applicant.

15.7 What must the respondent's opposing papers contain?

15.7.1 The respondent's opposing papers must contain, with the changes required by the context, the same information that the rules require an applicant to supply.⁹

15.7.2 This information is the following-

- the notice of opposition must be signed by the respondent or a person entitled to represent the respondent;

⁸ Rule 31 (5)

⁹ Rule 31 (5) (b)

- the notice of opposition must specify the case number allocated (if one has been allocated);
- the relief sought must be stated;
- the notice of opposition must be accompanied by an affidavit by the respondent setting out the names, description, addresses and fax numbers of the parties (if different from those supplied in the applicant's founding affidavit), a statement of material facts on which the opposition is based and any legal issues to be considered;
- supporting and confirmatory affidavits must be attached to the answering affidavit;
- In exceptional cases a commissioner may permit an affidavit to be substituted by a written statement.

15.8 In what way may an applicant reply to an answering affidavit?

- 15.8.1 The applicant has a right to file a replying affidavit within three days of receipt of the notice of opposition and answering affidavit.
- 15.8.2 The reply should not introduce new issues of fact or law and should only address issues raised in the answering affidavit.¹⁰

15.9 What are relevant considerations in deciding whether to relax the normal requirements for applications in urgent applications?

- 15.9.1 Where an urgent application is brought, the CCMA or the commissioner dealing with the application is empowered to dispense with the normal requirements, provided that the CCMA or such commissioner may only grant an order against a party who had reasonable notice of the application.¹¹
- 15.9.2 The party seeking urgent relief on short notice to the other party must explain to the CCMA or the commissioner dealing with the matter what necessitated the extent of any deviation from the time frames prescribed in the rules or the requirements of any other rule.
- 15.9.3 The explanation must be taken into account in deciding whether reasonable notice was given or to dispense with other requirements of the rules.
- 15.9.4 The prejudice that the applicant may suffer if the requirements of the rules are not dispensed with, as well the prejudice that the

¹⁰ Rule 31 (6)

¹¹ Rule 31 (8)

respondent may suffer as a result of dispensing with the requirements of the rules, must be considered.

15.10 When may applications be set down for hearing?

- 15.10.1 A date for the hearing of the application must be allocated once a replying affidavit is delivered, or once the time limit for delivering a replying affidavit has lapsed, whichever occurs first.¹²
- 15.10.2 Although it is not specifically so stated in the rules, an application may also be set down for hearing if no answering affidavit is filed and the time limit for delivering an answering affidavit has passed.
- 15.10.3 Whether these dates have passed would depend, *inter alia*, on the manner in which the notice of application with the founding affidavit or the notice of opposition with the answering affidavit, where relevant, was served on the other party.
- 15.10.4 If it is known when service was effected, applications (other than an urgent application) may be set down for hearing-
- if no notice of opposition with an answering affidavit is filed despite five days having lapsed after a notice of application with the founding affidavit was served on the respondent; or
 - if a notice of opposition with an answering affidavit is filed, and if no replying affidavit is filed despite three days having lapsed after the notice of opposition and the answering affidavit was served on the applicant.
- 15.10.5 If service was effected by registered post the document in question is presumed to have been received by the person to whom it was sent seven days after it was posted.¹³ Therefore, in such cases, an application (other than an urgent application) may be set down for hearing-
- if no notice of opposition with an answering affidavit is filed despite twenty-one days having lapsed after a notice of application with the founding affidavit was posted to the respondent; or
 - if a notice of opposition with an answering affidavit is filed, and if no replying affidavit is filed despite fourteen days having lapsed after the notice of opposition and the answering affidavit was posted to the applicant.

¹² Rule 31 (9) (a)

¹³ Rule 8

15.10.6 In order to ensure speedy resolution of disputes, the CCMA deems it fit to set down condonation applications relating to late referrals as soon as possible and at the same time as the matter is set down for a conciliation meeting, i.e. in such cases applications for condonation will be set down for hearing even though the time periods for filing of affidavits had not expired. If necessary answering and replying affidavits should be allowed to be handed in on the day of the hearing.¹⁴ The same applies to late requests for arbitration, which must be set down together with the arbitration.

15.11 In what manner may an application be determined?

15.11.1 Applications may be determined -

- on a motion roll¹⁵; or
- by the commissioner dealing with the conciliation or arbitration (as the case may be); or
- on the papers.¹⁶

15.11.2 Generally, condonation applications must be considered by the commissioner dealing with the conciliation, in the case of late referrals, or the commissioner dealing with the arbitration, in the case of late requests for arbitration. A ruling must be made immediately after the hearing of argument and the conciliation or the arbitration must proceed on the same day. In exceptional cases the CSC or his/her delegate may direct that a condonation application be heard separately from a conciliation or an arbitration.

15.11.3 In respect of applications other than condonation applications, the CSC or his/her delegate will decide which applications are to be set down for the hearing of oral argument on a motion roll, which applications are to be considered by the commissioner dealing with the conciliation or the arbitration, as the case may be, and which applications are to be decided on the papers. Generally, only unopposed applications or certain applications for adjournments will be decided on the papers.

15.12 What notice must be given of the set down of an application for oral argument?

15.12.1 If the application is set down for oral argument on the motion roll the parties must be given fourteen days notice of the hearing.

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¹⁴ Rule 31 (10) allows the CCMA to determine an application in any manner it deems fit.

¹⁵ Rule 31 (9) (c)

¹⁶ In terms of rule 31 (10) the CCMA or a commissioner may, despite the other sub-rules of rule 31, determine an application in any manner it deems fit. The intention behind rule 31 (10) is to enable the speedy determination of applications on papers in appropriate cases.

15.12.2 If the application is set down for oral argument at the commencement of a conciliation or arbitration process, notice of the hearing must, if possible, be given in the same time period as notice is given for the conciliation process or the arbitration hearing. If the application is brought at a time when the conciliation or arbitration is already set down, notice must be given that oral argument will be heard at the commencement of that process.

15.13 What procedure should be followed in hearing an application at the commencement of a conciliation or arbitration (as the case may be)?

15.13.1 Where applications are heard at the commencement of a conciliation or arbitration process, the commissioner should first hear the submissions of the party who brought the application, then the submissions of the party who opposed the application and thereafter the replication of the party who brought the application.

15.13.2 The commissioner must consider the affidavits as well as the oral submissions of the parties.

15.13.3 In exceptional cases, commissioners dealing with applications at the commencement of a conciliation or arbitration process, may allow oral evidence to be led to amplify the affidavits, provided that the other party is not unduly prejudiced thereby.

15.13.4 The commissioner dealing with the application must give *ex tempore* written rulings with brief reasons on the same day. A copy of the ruling must be handed to the parties on the day. Only in exceptionally difficult matters may the ruling be reserved in which event the ruling must be given within fourteen days.

15.14 Where can further guidelines for specific types of applications be found?

In paragraphs 15.16 to 15.24, further guidelines for specific applications are given or reference is made to the Chapter in which such guidelines may be found.

15.15 Condonation Applications

15.15.1 Where documents are filed late, application may be made to the CCMA to condone the late filing, if there is provision for condonation to be granted. For specific guidelines relating to condonation applications, refer to Chapter 16.

15.16 Applications to Join Parties

15.16.1 The CCMA or a commissioner may on its own accord or on application by a party or a person entitled to join the proceedings, join any number of persons as parties in the proceedings-

- if their right to relief depends on substantially the same question of law or fact; and/or
- if the party to be joined has a direct and substantial interest in the subject matter of the proceedings;¹⁷

An application to join a party may be made out of necessity or mere convenience.¹⁸

15.16.2 A joinder ruling may be made-

- after considering an application which is made in terms of rule 31; or
- by the CCMA or commissioner of his or her own accord; or
- if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party.¹⁹

15.16.3 In all unfair labour practice disputes concerning promotion, the successful candidate must be joined if the decision to appoint him/her is sought to be set aside.²⁰ The general rule is that if a commissioner anticipates that an order may be made against a party, then that party needs to be joined.

15.16.4 A trade union has a general interest in disputes concerning any of its members. It would also have a general interest in any dispute in which a collective agreement to which it is a party, would be relied on as the source of the rights being enforced. It would have a direct and substantial interest in a dispute in which the very issue for determination is the interpretation or application of a collective agreement to which it is a party. In such matters a trade union may be joined as a party.²¹

15.16.5 There is no need to join a party who has elected to abide by the decision of a commissioner or, where applicable, the CCMA.²²

15.16.6 A joinder is not effected by simply changing the citation of a party.²³

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¹⁷ Rule 26 (1) and (2)

¹⁸ Rule 26 (1) to (3)

¹⁹ Rule 26 (3)

²⁰ See *Gordon v Department of Health (337/2007)* [2008] ZASCA 99 (17 September 2008)

²¹ *Selela & others v Rand Water* [2002] 11 BLLR 1355 (LC)

²² *Selela & others v Rand Water (ibid)*

²³ *Mdlalose v Fila South Africa (Pty) Ltd* [2004] 3 BLLR 251 (LC)

15.16.7 A joinder ruling may be made at any time prior to the issuing of an award provided that the commissioner gives appropriate directions as to the further procedure in the proceedings particularly in regard to notice to the party concerned and delivery to such party of documents previously delivered in the proceedings.²⁴

15.16.8 A joinder ruling may not be made after an award was issued.

15.17 Applications to substitute a party

15.17.1 If it becomes necessary a commissioner may substitute a person/entity for an existing party on application by any party to the proceedings.²⁵

15.17.2 Substitution would, for example, be appropriate in circumstances where a wrong party was cited as respondent.²⁶ If it is merely a question of a defective citing, an application should be brought to correct the citation of the party concerned.

15.17.3 Substitution of a party may only be granted on application and commissioners should not of their own accord substitute a party.

15.17.4 On substituting a party the commissioner must give appropriate directions as to the further procedure in the proceedings, particularly in regard to notice to the party concerned and delivery to such party of documents previously delivered in the proceedings.²⁷

15.17.5 A party may not be substituted after an award has been issued

15.18 Applications to correct the citation of a party

15.18.1 Where a party has been incorrectly or defectively cited, the CCMA may on application and on notice to the parties concerned, correct the error.²⁸

15.18.2 If it is discovered after an award was issued that the party against whom the award was issued, was incorrectly cited, the party in whose favour the award was granted may apply on notice to the first mentioned party that the citation of that party be corrected and that the award be varied to reflect the correct citation. A ruling correcting the citation may be made after the award was issued and the award may be varied to reflect the correct citation. A typical example where

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²⁴ Rule 26 (5)

²⁵ Rule 26 (6)

²⁶ See *Rothschild v AMT Construction* (1999) 20 ILJ 2929 (LC) and *National Union of Metalworkers of SA & another v Total Service Station & others* (2002) 23 ILJ 1835 (LC)

²⁷ Rule 26 (6)

²⁸ Rule 27

this may be done is where an employer party was cited by its trading name and an application is made to correct the citation to reflect the correct particulars of the owner of the business.²⁹

15.19 Applications to consolidate dispute proceedings

The CCMA or a commissioner may of its own accord or on application consolidate more than one dispute to be dealt with in the same proceedings.³⁰ This would be appropriate in instances where several individual disputes were referred and during conciliation or arbitration it transpires that the facts and circumstances leading to the disputes are materially the same³¹ or where more than one dispute involving the same parties were referred separately, e.g. a dispute about a suspension as well as a dismissal dispute.

15.20 Applications for rescission or variation of a ruling or award

A commissioner may of his/her own accord, or on application by an affected party, vary or rescind an award or ruling-

- erroneously sought or erroneously made in the absence of one of the parties;
- in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- granted as a mistake common to the parties to the proceedings;³²
- on good cause shown.

For specific guidelines refer to Chapter 17 dealing with rescissions.

15.21 Applications to refer a dismissal dispute to the Labour Court

15.21.1 An application may be made by any party to a dispute that would ordinarily be arbitrated by the CCMA, that such dispute be referred to the Labour Court for adjudication,³³ save that a party who has already requested an arbitration may not thereafter bring such an application.³⁴

15.21.2 Such application must-

- be delivered by the party entitled to request an arbitration, within 90 days of a certificate of non-resolution being issued; or

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²⁹ See paragraphs 17.9.2 and 17.10.2

³⁰ Rule 28

³¹ See *Naidoo v JNP Development CC t/a Constantia Construction* (1999) 20 ILJ 3026 (CCMA)

³² Section 144 and Rule 32

³³ Section 191 (6) to (8)

³⁴ Rule 33 (2)

- be delivered by the other party/parties to the dispute within 14 days of the request for arbitration being filed; and
- must state the grounds upon which the request is made; and
- must state that the respondent has seven days to file an objection to the application.

15.21.3 The grounds that the Director will consider in deciding whether it is appropriate to refer the matter to the Labour Court must be dealt with in the founding affidavit and are the following³⁵

- the reason for dismissal (where applicable);
- questions of law raised by the dispute;
- the complexity of the dispute;
- whether there are conflicting arbitration awards that need to be resolved ; and
- the public interest.

15.21.4 The Director's decision must be communicated to the parties within fourteen days of the time period allowed for an objection having lapsed.³⁶ The decision is final and binding and no person may apply for a review of the decision until the dispute has been arbitrated or adjudicated, as the case may be.³⁷ This form of application may be decided on papers or formal hearing.

15.22 Application for postponement

15.22.1 An arbitration may be postponed by agreement and without a need for the parties to appear if there is a written agreement between the parties and if such agreement is received by the CCMA at least seven days prior to the date on which the arbitration was due to be heard.³⁸

15.22.2 An application for postponement is required in two instances i.e.

- if the parties to the dispute cannot reach agreement that the matter should be postponed; and

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³⁵ Section 196 (6)

³⁶ Rule 33 (5)

³⁷ Section 191 (9) and (10)

³⁸ Rule 23(2)

- if the parties reached agreement that the matter should be postponed but a written agreement was not received by the CCMA at least seven days prior to the scheduled date of the arbitration.

15.22.3 An application for postponement is made -

- by delivering an application that complies with rule 31 to the other parties to the dispute; and
- by filing a copy of the application and proof of service on the other parties with the CCMA before the scheduled date of the arbitration.³⁹

15.22.4 In the founding affidavit on which the application for postponement is based, good cause for the postponement must be shown and the factors that should be dealt with include the following factors:⁴⁰

- whether the application was timeously made;
- whether the explanation given by the applicant for postponement is full and satisfactory;
- whether there is prejudice to any of the parties; and
- whether the application is opposed.

15.22.5 Further factors that should be dealt with include the following:

- whether the date for the arbitration hearing was agreed with the parties;
- the history of previous postponements;
- the importance of the case;
- the prospects of success of the party applying for the postponement;
- whether indulgences had previously been granted to the other party to the dispute;
- the cost to the CCMA;

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³⁹ Rule 23 (3)

⁴⁰ *National Police Service Union and others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC) at 1112F-H. See also *Moshela v CCMA & others* (unreported Labour Court Case No JR1524/06).

- the public interest, including the expeditious resolution of labour disputes and in particular the effect that postponements have on the expeditious resolution of other disputes.

15.22.6 If the application was brought on an urgent basis i.e. without affording the other parties the fourteen day period referred to in rule 31 (5) (a) to file answering affidavits, such party should show good cause why the requirements of the rule should be dispensed with in terms of rule 31 (8).

15.22.7 Upon receipt of an application for postponement that complies with the rules the CCMA may deal with the matter in one of two ways i.e. it may-

- without convening a hearing, postpone the matter, or
- convene a hearing to determine whether to postpone the matter.⁴¹

15.22.8 In exercising the discretion referred to in the preceding paragraph the CCMA must take into account the urgency of the application, if any, and the extent to which the other party/parties had an opportunity to file answering affidavits.

15.22.9 The discretion should generally be exercised in favour of postponing the matter without convening a hearing –

- if the circumstances are such that it is not possible for the party seeking the postponement to attend or to be represented at a hearing, or
- if the other party/parties had reasonable opportunity to file answering affidavits or have filed answering affidavits; and
- if good cause for a postponement was shown on the papers.

15.22.10 The discretion should generally be exercised in favour of convening a hearing –

- if it is possible for the party seeking the postponement to attend or be represented at a hearing and the other party/parties did not have reasonable opportunity to file answering affidavits; or
- if it is possible for the party seeking the postponement to attend or be represented at a hearing and the other party/parties filed answering affidavits opposing the postponement and the

decision whether to postpone the matter may be affected by oral argument.

15.22.11 An application for a postponement brought on the scheduled date of the arbitration should only be considered if it is shown that good cause exists for treating it as an urgent application in respect of which the requirements of rule 31 may be dispensed with in terms of rule 31 (8). Factors to be considered include, where applicable

- the explanation for not seeking the consent of the other party timeously;
- where the other party consented, the explanation for not notifying the CCMA in writing of the agreement to postpone the matter earlier than seven days prior to the scheduled date of the arbitration and for not bringing an application that complied as far as possible with the requirements of rule 31;
- whether the other party/parties were given as much notice of the application as was reasonably possible and, if not, the explanation for not giving such notice;
- the prejudice that the respondent(s) would suffer should the application for postponement be heard on an urgent basis or that the applicant would suffer should it not be heard.

15.22.12 Should a ruling be made to dispense with the requirements of rule 31, oral evidence and/or submissions may be heard about *inter alia* the factors referred to above if no or inadequate affidavits were filed.

15.22.13 The following considerations are relevant in deciding whether or not to grant a postponement:

- The CCMA/the commissioner has a discretion whether an application for postponement should be granted or refused;
- The discretion must at all times be exercised judicially and for substantial reasons and should not be exercised capriciously or on any wrong principle;
- The CCMA/the commissioner must reach a decision after properly directing its/his/her attention to all relevant facts and principles including those referred to in paragraphs 15.23.8 and 15.23.9 above. The said factors are not necessarily individually decisive and the weight to be attached to each factor is within the CCMA's/the commissioner's discretion.

- An application for postponement must be made timeously and as soon as the circumstances which may justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement, the CCMA/the commissioner may in appropriate cases allow a postponement even though the application was not timeously made;
- The application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled;
- Where a postponement will cause prejudice to the adversary of the applicant for a postponement, it must be considered whether this can fairly be compensated by an appropriate order of costs or any ancillary mechanisms.

15.22.14 If the CSC or his/her delegate makes a ruling prior to the scheduled time for the arbitration, that the application for postponement is granted and that the arbitration is postponed, the matter must be removed from the roll and the parties must be notified of the ruling immediately.

15.22.15 If the CSC or his/her delegate affords the parties a hearing and makes a ruling refusing to grant a postponement application prior to the scheduled time for the arbitration hearing, the arbitration must remain on the roll and the arbitrating commissioner may not entertain a further application for postponement unless it is based on new facts or circumstances that were not before the CSC or his/her delegate when the postponement was refused.

15.22.16 In regions where it is the practice to do so the CSC or his/her delegate must be consulted before a ruling is made to postpone the matter.

15.23 Applications regarding jurisdictional objections

15.23.1 A dispute cannot be conciliated or arbitrated by the CCMA unless it has jurisdiction to do so. Notwithstanding the CCMA's endeavours to discourage legal technicalities, a variety of jurisdictional objections are raised at conciliation or arbitration. Such jurisdictional objections, *inter alia*, relate to-

- Alleged defective referrals (e.g. identity of the parties, validity of signatures on referral forms, date of dispute, late referrals without condonation etc.);

- Alleged absence of employer-employee relationships (e.g. allegations that the referring party was an independent contractor or that there was never any employment relationship);
- Alleged absence of a dismissal (e.g. alleged expiry of fixed term contracts and alleged resignations);
- Alleged absence of a dispute (e.g. alleged settlement agreements);
- Territorial jurisdiction;
- The *locus standi* of representatives;
- Alleged incorrect categorisation of disputes;
- Diplomatic immunity.

15.23.2 Normally parties desiring to raise any of the above jurisdictional objections should be required to comply with rule 31 by filing a formal application and affording the other side an opportunity to respond. Where such issues are raised during a process without a formal application, commissioners may in appropriate circumstances postpone the proceedings to allow the parties to comply with the provisions of rule 31, e.g. where the issues are complicated but it is nevertheless possible to decide the matter on affidavit. Commissioners should deal with matters expeditiously and with a minimum of legal formality. This may require the commissioner to depart from the provisions of rule 31 as is provided for in rule 31 (10) and to hear oral submissions and/or evidence on the jurisdictional issue raised, prior to making a decision. This approach should particularly be adopted where the commissioner of his or her own accord raises a jurisdictional issue or where the objection is a fairly simple one.

15.23.3 If the referring party has alleged that an employment relationship existed and that allegation is in dispute, commissioners should not make a ruling at conciliation determining whether an employment relationship actually existed. In such cases the commissioner should attempt to persuade parties to agree to leave such issue for decision at the arbitration stage.⁴² The CCMA has jurisdiction to conciliate if an applicant has alleged that an employment relationship existed

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⁴² *Eoh Abantu (Pty) Ltd v CCMA & others* (2010) 31 ILJ 937 (LC); [2010] 2 BLLR 172 (LC). In *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2009] 12 BLLR 1214 (LC) para 20, Van Niekerk J also indicated that “despite the wording of rule 14, jurisdictional points are better determined after the hearing of evidence (and subject to the commissioner’s discretion) at the arbitration phase in terms of rule 22 of the CCMA Rules. This is particularly so in regard to points such as whether the referring party was an “employee” as defined by s 213, or was “dismissed” for the purposes of section 186.”

and a dispute concerning such issue must be decided at the arbitration stage.⁴³ If one or both parties insist that a ruling should be made, a ruling should be made whether or not it was sufficiently alleged that an employment relationship existed and, if so, that the CCMA has jurisdiction to conciliate. It should however be made clear that it is not a final ruling on whether an employment relationship existed and that that issue is to be decided at arbitration.

- 15.23.4 If it is common cause during the conciliation stage that no employment relationship existed, the CCMA does not have jurisdiction to conciliate and a ruling to such effect must be made. Likewise if an employee referred an unfair dismissal dispute and it is common cause at conciliation that no dismissal occurred, the CCMA would not have jurisdiction to conciliate the dispute that was referred and a ruling to such effect must be made. In such cases the referring party must be required to acknowledge in writing that no employment relationship existed or that no dismissal occurred, as the case may be, and the ruling must be based on such acknowledgement.

⁴³ In terms of the definition of "*dispute*" in section 213, it includes an alleged dispute.

Chapter 16: Condonation Applications

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16.1 When is a condonation application necessary?

- 16.1.1 It is necessary for a party to apply for condonation when the time limits that are prescribed in the LRA and EEA and the CCMA Rules have not been complied with.¹
- 16.1.2 The LRA specifies time limits within which referrals for conciliation and requests for arbitration are to be filed with the CCMA.² Likewise the Employment Equity Act, as amended, sets time limits within which to refer a dispute.
- 16.1.3 The CCMA Rules set time limits within which certain procedural steps are to be taken. Examples include the time periods for making

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¹ Section 191(2) of the LRA

² Section 191(1) (b) of the LRA

rescission applications and for filing notices of opposition and replying affidavits in other applications.

- 16.1.4 Where a party fails to comply with the stipulated time limits, he/she loses the right to have his/her dispute dealt with or to have his/her application documents considered by the CCMA, unless such failure is condoned on good cause shown.
- 16.1.5 In the case of the late filing of a referral or application documents, condoning a party's non-compliance with the prescribed time limits has the effect of restoring that party's right to be heard.

16.2 At which stage should a party apply for condonation?

- 16.2.1 The Rules specify that a party must apply for condonation when delivering a late referral or late application document to the CCMA.³ Further, the CCMA must accept, but may refuse to process a referral document until Rule 10 (2) is complied with. In terms of the Rules it is only considered a proper referral once the application for condonation is attached.
- 16.2.2 Accordingly where a party files a referral or application document⁴ and a case management officer (CMO) from the CCMA screening and allocations team (SAT) establishes that the referral is out of time, the CMO must receive but should not process the referral and should advise the referring party to complete a condonation application form. Further, the CMO should advise the referring party that the CCMA lacks jurisdiction to deal with a late referral unless condonation is granted.
- 16.2.3 The LRA also allows an employee, who has referred a late unfair dismissal or unfair labour practice dispute to the CCMA, to bring an application for condonation at any time.⁵
- 16.2.4 The words "*at any time*" have been interpreted to mean at any time prior to a certificate of non-resolution being issued.⁶
- 16.2.5 This interpretation is in line with other decisions of the Labour Court, which state that a late referral of a dismissal dispute must be condoned prior to conciliation proceedings and if a late referral is not

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³ Rule 9(2)

⁴ This chapter deals with the late filing of referrals (LRA Form 7.11) and request for arbitration (LRA Form 7.13) as well as application documents. Any reference to referrals should, where appropriate, be read to include application documents.

⁵ Section 191(2).

⁶ See *Schalk & Rina Brandt cc t/a Alfa Matte v Molotsi NO & others* (2005) 26 ILJ 2430 (LC) at 2433.

condoned before conciliation, a valid certificate of outcome cannot be issued.⁷

- 16.2.6 Where it is only discovered at conciliation that a referral is out of time, the commissioner dealing with the matter should suspend the conciliation and advise the referring party of the need to apply for condonation. It is advisable for the Commissioner to deal with the condonation immediately and if condoned, proceed to conciliate.
- 16.2.7 Where it is only discovered at arbitration that the dispute was referred out of time, the Commissioner has jurisdiction to arbitrate unless the certificate was set aside by consent or by the Labour Court⁸.
- 16.2.8 Where it is discovered at arbitration that a request for arbitration is out of time it is advisable for the Commissioner to deal with the condonation immediately and if condoned, proceed to arbitration.
- 16.2.9 The general principle with regard to a late referral for an application is that a party should apply for condonation as soon as possible after becoming aware of the need for such application.⁹

16.3 How is a condonation applied for?

- 16.3.1 In applying for condonation a party must do so in terms of Rule 31 read together with Rule 9 of the CCMA Rules.

16.4 What procedure is followed by the CCMA when considering a condonation application?

- 16.4.1 Notices of set down of the hearing of the application must be sent to the parties shortly after the application was received and the application must be set down for hearing on the same day as the conciliation or, in the case of a late request for arbitration, on the same day as the arbitration.
- 16.4.2 The answering affidavit and the replying affidavit must be placed in the file if they are received prior to the date of set down. Commissioners must accept such affidavits even on the day of the hearing if the other party will not suffer any prejudice.

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⁷ See *Alternative Finance Ltd v Adair NO & others* (1998) 10 BLLR 1011 (LC) and *Gianfranco Hairstylists v Howard & others* (2000) 3 BLLR 292 (LC).

⁸ See *Fidelity Guards Holding (Pty) Ltd v Epstein and others* (DA25/99) [2000] ZALAC 8 (1 September 2000)

⁹ See *CWIU & another v Ryan & others* (2001) 3 BLLR 337 (LC).

- 16.4.3 Condonation applications are generally argued by reference to the affidavits only.¹⁰ Commissioners may however also permit oral evidence at the hearing in order to prevent delays and injustices. Condonation applications may also be dealt with orally when a commissioner dealing with a matter ascertains at conciliation or arbitration that the issue of condonation has not been dealt with.
- 16.4.4 Where it is not possible for the commissioner to determine the issue of condonation after hearing oral evidence and argument from the parties, for example, where the issues raised in the condonation application are complex, the commissioner may issue a written ruling later provided that it must be done within fourteen days.
- 16.4.5 Where one or both of the parties are not ready to proceed with an oral hearing, the commissioner should postpone the matter and request that the parties submit affidavits. In exceptional circumstances the commissioner may permit the parties to submit written statements instead of the affidavits specified in the Rules.¹¹ Further, the commissioner should advise the parties to submit their application documents within specified time periods.
- 16.4.6 After an adjournment envisaged by the preceding paragraph the condonation application must immediately be set down to prevent delays and the affidavits must be placed in the file once they are received.
- 16.4.7 When dealing with a condonation application, the commissioner should always ensure that both parties are given an adequate opportunity to make oral or written submissions and, where appropriate, to submit relevant documents in support of their contentions.

16.5 What are the relevant considerations in determining a condonation application?

- 16.5.1 The commissioner dealing with a condonation application has a discretion to grant or refuse condonation, after considering whether the applicant has shown good cause.
- 16.5.2 The words “*good cause*” are not defined in the LRA or the EEA but it is well established that the commissioner dealing with a condonation should consider the following factors-
- the degree of lateness;

¹⁰ Rule 31(9) specifies that applications for condonation must be set down for hearing. Sub-rule (10) gives the CCMA or a commissioner dealing with a condonation application the power to deal with such application in any manner that is appropriate.

¹¹ Rule 31(7)

- whether there is a satisfactory explanation for the delay;
- the applicant's prospects of succeeding with the referral and obtaining the relief sought against the respondent;
- any prejudice that the other party would suffer should condonation be granted.
- any other relevant factors, e.g. the importance of the case.

16.5.3 When determining an application for condonation, a commissioner should consider the various factors objectively and holistically, as they are interrelated and not individually decisive.¹² However, as indicated hereunder, if there is no explanation for the delay or if a party has no prospects of success, that might on its own be a reason for refusing to grant condonation.¹³

16.5.4 It is not irregular to place more weight on one factor than on the other factors. For example, a commissioner dealing with a condonation application may find that a slight delay and a good explanation compensate for prospects of success that are not strong or that the importance of the issue and strong prospects of success compensate for a long delay.¹⁴ The weight that is given to any one factor, varies from case to case depending on the circumstances of each case.

16.5.5 Where the reason for the late filing of a referral or application document relates to failure on the part of the applicant's legal or union representative to act timeously, a commissioner may refuse condonation. The Labour Court has held that an applicant cannot always rely on the negligence of his representative to justify a late filing of a referral or application document.¹⁵ A commissioner should be hesitant to refuse condonation where the delay was due to the negligence of a representative without considering all the facts, such as, any attempts that the applicant may have made in actively ascertaining the progress made by his representative.¹⁶

16.5.6 When considering the applicant's prospects of obtaining the relief sought, a commissioner should evaluate what the chances are that the applicant would be able to prove the allegations on which the

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¹² See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)

¹³ See *Moila v Shai NO & others* (2007) 27 ILJ 935 (LAC)

¹⁴ See *Melane v Santam Insurance Co Ltd and SA Broadcasting Corporation v CCMA & others* 2003 (24) ILJ 999

¹⁵ See *Xiyaya v African National Congress* 2000 (4) BLLR 477 (LC), *Parker v V3 Consulting Engineers (Pty) Ltd* 2000 (21) ILJ 1192 (LC)

¹⁶ See *Arnot v Kunene Solutions & Services (Pty) Ltd* 2002 (23) ILJ 1367 (LC) and *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Metal Box t/a MB Glass* 2005 (26) ILJ 92 (LC)

case is based and, if the allegations are proved, whether the applicant would be entitled to the relief sought. This does not require an in depth evaluation of the merits of the case.

16.5.7 A commissioner may refuse condonation solely on the grounds that the applicant has no prospects of success, as there would be no point in granting condonation under such circumstances.

16.5.7.1 When considering the prejudice that may be suffered by the respondent if condonation is granted, a commissioner should bear in mind that the granting of condonation obliges the respondent to prepare a full defence to the applicant's allegations. This entails utilising the necessary resources with the associated costs. The respondent may further be prejudiced in preparing a defence if the referral or application is significantly late as, among other things, evidence may have been lost or witnesses may no longer be available. The prejudice that an applicant suffers if condonation is refused includes being deprived of a hearing.

16.5.8 When considering an application for condonation, a commissioner should take into account any other relevant factors referred to by the parties. The matter may, for example, be of public importance, have an impact on the interpretation or application of labour law, challenge important legal principles or have media attention.

16.7 How is the outcome of a condonation application recorded and what is the status of such ruling?

16.6.1 A commissioner's decision to grant or refuse condonation should be set out in a written ruling with brief reasons for the decision.

16.6.2 A condonation ruling is final and binding on the parties. Rulings where the CCMA refused to condone late referrals or late requests for arbitration, bring matters to an end and may be taken on review.

16.8 What steps are followed by the CCMA after a condonation application has been determined?

16.8.1 After the hearing of oral argument the commissioner must communicate his decision to both parties and provide them with copies of his written ruling and the reasons for it.

16.8.2 Where condonation was granted and the next process did not proceed on the day, the CMO should proceed to set the matter down for being either conciliation, con-arb or arbitration. Where condonation has been refused, the CCMA has no jurisdiction to deal with the referral or application and the file will be closed.

- 16.9 Where a dispute is referred out of time, when does the 30-day period for conciliating the dispute expire?**
- 16.9.1 The 30-day period within which the CCMA must conciliate a dispute only starts to run once condonation has been granted and the CCMA has established jurisdiction over the dispute.

Chapter 17: Rescissions and variations

Contents

- 17.1 What are the statutory provisions and rules that apply to rescissions and variations?
- 17.2 How are the statutory provisions to be interpreted?
- 17.3 Who may apply for rescission and what awards and rulings may be rescinded?
- 17.4 What is the time limit for bringing a rescission application?
- 17.5 What should be considered in determining an application brought in terms of section 144 (a)?
- 17.6 What should be considered in determining an application brought in terms of section 144 (b)?
- 17.7 What should be considered in determining an application brought in terms of section 144 (c)?
- 17.8 What procedure should be followed after a rescission ruling?

17.1 What are the statutory provisions and rules that apply to rescissions and variations?

17.1.1 Section 144 of the LRA deals with variations and rescissions of awards and rulings. and provides that *“any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner’s own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling –*

- *erroneously sought or erroneously made in the absence of any party affected by that award;*
- *on good cause shown¹*
- *in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or*
- *granted as a result of a mistake common to the parties.*

17.1.2 CCMA Rule 32 specifies the time period within which an application may be made for rescission.

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¹ See *Professional Transport Worker’s Union v Malema and others* (JA67/12) [2014] ZALAC 53 (7 October 2014)

17.2 How are the statutory provisions to be interpreted?

17.2.1 Section 144 (a) means that a ruling or award made in the absence of a party is erroneously made and may be rescinded or varied -

- if there was an irregularity in the proceedings, (such as, where proper notice of set down was not given); or
- if it was not legally competent for the commissioner to have made such ruling or award (such as, where the CCMA did not have jurisdiction to make the award); or
- if at the time of issuing the ruling or award there existed a fact of which the commissioner was unaware, which would have precluded the making of the award or ruling and which would have induced the commissioner, if he/she had been aware of it, not to grant the award or ruling. (The absence of wilful default or gross negligence as well as the existence of a *bona fide* case may constitute such a fact).²
- Good cause...requires commissioners to deal with wilful default by the applicant for rescission and reasonable prospects of success in the main. The applicant for rescission must show that it never intended to abandon the case.

17.2.2 The purpose of section 144 (b) is not to provide for changing the decision of the commissioner. Rather, it is intended to allow ambiguities to be clarified (for example, if the commissioner failed to indicate by when compensation should be paid) or for obvious errors or omissions to be corrected (for example, the spelling of the names of the parties and calculation errors). Generally it is not open to a party to apply for rescission on the grounds that the commissioner's reasoning was incorrect.

17.2.3 Section 144 (c) envisages a situation where both parties regarded material facts as common cause when in actual fact both of them were mistaken and where the award or ruling would not have been granted had the correct facts been placed before the commissioner.

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² See *Lumka and Associates v Maqubela* (2004) 25 ILJ 2326 (LAC); *Northern Training Trust v Maake & others* (2006) 27 ILJ 828 (LC) and *Shoprite Checkers (Pty) Limited v CCMA and others* (2007) 28 ILJ 2246 (LAC); [2007] BLLR 817 (LAC).

17.3 Who may apply for rescission and what awards and rulings may be rescinded?

- 17.3.1 A party affected by an award or ruling of the nature referred to in section 144 and rule 32 may apply for rescission of that award or ruling.
- 17.3.2 If a party relies on the ground referred to in section 144 (a), i.e. that the award or ruling was erroneously made in his/her absence, it follows that only a party who was in fact absent may bring such an application. A party is deemed to have been present during the proceedings that led to the award or ruling if such party was represented during the proceedings unless the representative withdrew during the proceedings.
- 17.3.3 If a party relies on the grounds referred to in section 144 (b) or (c), it is not a requirement that such party was absent during the proceedings as such applications for rescission may be brought even if the party was present during the proceedings.
- 17.3.4 All awards and rulings may be rescinded if one of the grounds referred to in section 144 is present. Such rulings include rulings that an arbitration should proceed in the absence of a party, rulings refusing or granting condonation of a late referral of a dispute or a late application, rulings relating to the jurisdiction of the CCMA and rulings refusing or granting rescission applications.

17.4 What is the time limit for bringing a rescission application?

- 17.4.1 A rescission application must be brought within fourteen days of the date on which the Applicant became aware of the award or ruling.

17.5 What should be considered in determining an application brought in terms of section 144 (a)

- 17.5.1 A commissioner should first consider whether proper notice of set down was given. If proper notice was not given, the commissioner should-
- indicate that in his/her reasons;
 - find that there was an irregularity in the proceedings that resulted in the default award or ruling; and
 - rescind the award or ruling solely for that reason.
- 17.5.2 Where it is proved that notice was given to the affected party the commissioner must consider whether the affected party had proved

that the commissioner who made the default award or ruling was unaware of relevant facts that would have precluded the making of the award or ruling and which would have induced the commissioner, if he had been aware of it, not to grant the award or ruling.

In this regard it should be considered whether the affected party had proved on a balance of probabilities-

- that the failure to appear or to oppose the relief contained in the default award or ruling was not due to wilful default or gross negligence of the affected party;
- that the rescission application is *bona fide* and not made solely for purposes of delaying the matter; and
- that the affected party has a *bona fide* case, i.e. that such party has set out facts which if proved, would entitle such party to relief.

17.6 What should be considered in determining an application brought in terms of section 144 (b)?

17.6.1 Commissioners should consider whether to clarify the ambiguity or to rectify the obvious error or omission referred to in the application papers.

17.6.2 The citation of a party in the award may be varied in appropriate circumstances. If an incorrect citation constitutes an ambiguity or an obvious error or omission, then the award may be varied for that reason.³

17.7 What should be considered in determining an application brought in terms of section 144 (c)?

17.7.1 Commissioners should consider whether the mistake was in fact common to both parties and whether the award or ruling would not have been granted or would have been different had it not been for such common mistake on the part of the parties.⁴

17.7.2 If the incorrect citation of a party in the award came about through a mistake common to the parties the award may be varied to reflect the correct citation of that party. A typical example of this is where both parties were present during the arbitration and both of them

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³ See paragraph 15.19.2

⁴ See *McDonalds SA (Pty) Ltd v CCMA & others* [2003] 10 BLLR 1020 (LC)

failed to inform the arbitrator of the correct citation of the employer party.

17.8 What procedure should be followed after a rescission ruling?

The matter must be set down for the hearing to continue and special care should be exercised that the same error is not repeated.

CHAPTER 18: COSTS

Contents

- 18.1 What statutory provisions and rules govern costs?
- 18.2 When may costs be awarded?
- 18.3 What cost orders may be made?
- 18.4 The general principles regulating costs awards
- 18.5 Law and fairness
- 18.6 What are the relevant considerations when making cost orders?
- 18.7 Cost disputes

18.1 What statutory provisions and rules govern costs and taxation?

- 18.1.1 Section 138 (10) of the LRA provides that “the commissioner may make an order for the payment of costs according to the requirements of law and fairness in accordance with rules made by the CCMA in terms of section 115 (2A) (j) and having regard to (a) any relevant Code of Good Practice issued by NEDLAC in terms of section 203; and (b) any relevant guideline issued by the Commission.”
- 18.1.2 The CCMA has now made rules in terms of section 115(2A) (j) of the LRA. Rule 39 confirms that the basis on which an order for costs should be made is “law and fairness”.

18.2 When may costs be awarded?

- 18.2.1 Costs may only be ordered at Arbitration.

18.3 What cost orders may be made?

- 18.3.1 There are two types of costs that may be awarded; legal costs and reasonable disbursements – see in this regard Rule 39 for the scale.
- 18.3.2 Although a Commissioner has a discretion to award costs, the actual quantum thereof is provided for in the Rules.

18.4 The general principles regulating costs

- 18.4.1 Costs are at the discretion of the Commissioner.
- 18.4.2 The awarding of costs by a Commissioner in appropriate circumstances is not compensation.¹
- 18.4.3 Commissioners have a discretion whether to award costs or not and such discretion must be exercised with proper regard to all of the facts and circumstances of each case.
- 18.4.4 Considerations which may deprive a successful party of costs depend on circumstances such as, the conduct of the parties, the conduct of the representative, whether the party achieve technical success only and the nature of the proceedings².
- 18.4.5 The normal rule that costs follow the result is not automatically applicable. What is required is to strike a balance, on the one hand, not to unduly discourage parties from approaching the CCMA to have their disputes dealt with, and, on the other hand, allowing parties to bring frivolous cases that should not be brought to the CCMA. The balance is not always easy to strike, but if the CCMA is to err, it should err on the side of not discouraging parties to approach the CCMA with their disputes rather than resorting to industrial action³.

18.5 Law and fairness

- 18.5.1 Section 138(10) of the LRA as well as Rule 39 state that orders for payment of costs may be made according to the requirements of law and fairness.

18.6 What are the relevant considerations when making cost orders?

- 18.6.1 Rule 39 states that a commissioner must have regard to -
- a) the measure of success that the parties achieved;
 - b) considerations of fairness that weigh in favour of or against granting a cost order;
 - c) any "with prejudice offers" that were made with a view to settling the dispute;

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¹ *Payen Components South Africa Ltd v Bovic Gaskets* CC 1999 2 SA 409 (W)

² *Ferreira v Levin NO and others* 1996 (2) SA 621 (CC) at 624B - C.

³ *Ball v Bambalela Bolts (Pty) Ltd and another* [2013] 9 BLLR 843 (LAC).

- d) whether a party or the person who represented that party in the arbitration proceedings acted in a frivolous and vexatious manner. A party will act **frivolously** if he or she pursues a dispute at arbitration or defending the matter if it is manifestly futile and/or not worthy of serious attention¹.

A party will act **vexatiously** if he or she pursues a dispute at arbitration or defending the matter without sufficient grounds and especially if done to cause annoyance to the other party.

- i.) by proceeding with or defending the dispute in the arbitration proceedings, or
- ii.) in its conduct during the arbitration proceedings;
- e) the effect that a cost order may have on a continued employment relationship;
- f) any agreement concluded between the parties to the arbitration concerning the basis on which costs should be awarded;
- g) the importance of the issues raised during the arbitration to the parties as well as to the labour community at large;
- h) any other relevant factor.

18.6.2 Circumstances which may justify a costs order include if a party or its representative has been dishonest, reprehensible or unreasonable. In general, costs orders should not be awarded if there is a genuine dispute no matter how weak its merits.

18.6.3 Where parties will have an ongoing relationship after the dispute has been resolved, a cost order, especially where the dispute has been a *bona fide* one, may damage that relationship and thereby detrimentally affect industrial peace.

18.6.4 The conduct of the parties at the time that the dispute arose, as well as during the proceedings, should be taken into account.

18.6.5 It is relevant to consider whether the issues raised are of fundamental importance not only to the parties but to all players in the important arena of industrial conciliation.

18.6.6 Although “success” is a factor, it is not the only determinative factor.

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¹ S v Cooper and other 1977 (3) SA475 (TPD) at 476D and African Farms and Townships v CT Municipality 1963 (2) SA 555 (AD) at 565D.

18.6.7 The CCMA has laid down the following principles:

- A technical approach should not be followed when an applicant is not versed in legal matters. A great deal of latitude should be allowed¹.

18.6.8 Commissioners must address these factors in the award. It must be clear from the award that the commissioner has applied his or her mind and the commissioner must give reasons why costs are awarded.

18.7 Disputes concerning Costs

18.7.1 In terms of Rule 39(5) the Director of the CCMA may appoint taxing officers to determine any dispute that may arise from any award of costs in terms of this Rule. The only dispute that may arise, will be in relation to an order to pay disbursements as envisaged by Rule 39(2).

18.7.2 Any dispute concerning an award of costs must be submitted on LRA Form 7.17 to which any relevant documentation must be annexed.

Chapter 19: Enforcement of Settlement Agreements and Arbitration Awards

Contents

- 19.1 What statutory provisions and rules govern the enforcement of settlement agreements and awards?
- 19.2 What are the requirements to be met before a settlement agreement may be made an arbitration award?
- 19.3 What procedure must be followed in certifying arbitration awards?
- 19.4 How is an award sounding in money to be enforced?
- 19.5 How is an award requiring the performance of an act other than payment of an amount of money to be enforced?
- 19.6 May an award be rescinded after certification/after being made an order of Court?
- 19.7 May interest be added in writs of execution?
- 19.8 When is it no longer possible to certify an award?
- 19.9 When is it no longer possible to make an award an order of the Labour Court?
- 19.1 What statutory provisions and rules govern the enforcement of settlement agreements and awards?**
- 19.1.1 A party wishing to enforce an award may-
- if it is an award for payment of money e.g. compensation or statutory monies and an award directing specific performance such as reinstatement and re-employment apply to the Director of the CCMA or his/her delegate for the award to be certified as a final and binding award.
- 19.1.2 A final and binding arbitration award issued by a commissioner, certified as such by the Director, may, in terms of section 143 of the LRA, be enforced as if it were an order of the Labour Court.
- 19.1.3 The Labour Court may, in terms of section 158 (1) (c), make an arbitration award an order of the Labour Court and, once that was done, such order may be enforced like any other order of the Labour Court.

- 19.1.4 If a party fails to comply with a written settlement agreement entered into in respect of a dispute that a party has the right to refer to arbitration or to the Labour Court, and if the settlement agreement was entered into in respect of **a dispute that was referred to the CCMA**, the party wishing to enforce the settlement agreement has at least two options in that such party may make an application to the CCMA or to the Labour Court.¹
- 19.1.5 The CCMA may, in terms of section 142A, by agreement between the parties or on application by a party, make the settlement agreement an arbitration award and such arbitration award may then be enforced in terms of section 143.²
- 19.1.6 The Labour Court may, in terms of section 158 (1) (c), on application by a party, make the settlement agreement an order of the Labour Court and such order may then be enforced like any other Labour Court order.³
- 19.1.7 If a party fails to comply with a written settlement agreement entered into in respect of a dispute that a party has the right to refer to arbitration or to the Labour Court and **the dispute had not been referred to the CCMA when the settlement agreement was entered into**, the Labour Court may, in terms of section 158 (1) (c) read with section 158 (1A), on application by a party, make such settlement agreement an order of the Labour Court.⁴ The CCMA does not have jurisdiction to make such settlement agreements awards.
- 19.1.8 Once an award is certified, it can be executed upon delivery to the Sheriff. In terms of the LRAA of 2014 there is no need to approach the Labour Court for a writ to be issued first⁵. An award ordering the performance of any other act, once certified is to be enforced by way of contempt proceedings instituted in the Labour Court.⁶

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¹ *Such party would also have his/her/its ordinary civil remedies such as to sue for breach of contract but that would possibly be a far more expensive option.*

² *This does not apply in respect of disputes that a party is only entitled to refer to arbitration in terms of section 74 (4) or 75 (7) i.e. certain essential services and certain maintenance services disputes.*

³ *This does not apply in respect of disputes that a party is only entitled to refer to arbitration in terms of section 22 (4), 74 (4) or 75 (7) i.e. certain organization rights disputes, certain essential services disputes and certain maintenance services disputes.*

⁴ *Sivraj v Caspian Freight CC (Case Nos: KZNRFCB 2390 and KZNRFCB 9092) See however Molaba & others v Emfuleni Local Municipality [2009] JOL 23477 (LC).*

⁵ *This new provision will only apply to awards issued after the 1st of January 2015.*

⁶ *Section 143 (4)*

19.1.9 Rule 40 regulates the manner in which applications for certifications of awards are to be made.

19.2 What requirements are to be met before a settlement agreement may be made an arbitration award?

19.2.1 The settlement agreement must be in writing.

19.2.2 The settlement agreement must have been entered into in respect of a dispute that had already been referred to the CCMA at the time that the settlement agreement was entered into.

19.2.3 Subject to paragraph 19.2.4 it must have been entered into in respect of a dispute that a party has the right to refer to arbitration or to the Labour Court.

19.2.4 The settlement agreement must not have been entered into in respect of a dispute that a party has the right to refer to arbitration in terms of section 74 (4) (interest disputes in essential services) or 75 (7) (interest disputes where employees are engaged in a maintenance service).

19.2.5 The settlement agreement or any other written agreement between the parties must make provision for the settlement agreement to be made an arbitration award; or one of the parties to the settlement agreement must have applied on notice to the other party that the settlement agreement be made an arbitration award; or the CCMA must have notified the other party of the application.

19.2.6 The settlement agreement must have been entered into freely and voluntarily.

19.2.7 The settlement agreement must be enforceable.

19.3 What procedure must be followed in certifying awards?

19.3.1 In terms of rule 40 (1) an application for certification must be made on, or contain the information in, LRA Form 7.18, and the arbitration award must be attached. The information includes-

- the identity of the parties;
- details of the award, attaching a copy of it;
- where applicable, details of the settlement agreement that was made an award, attaching a copy of it;

- the manner in which the award was served on the respondent, attaching proof of such service; and
- the extent of the respondent's failure to comply with the award.

19.3.2 The applicant must as far as possible satisfy the CCMA that a copy of the application was served on the party against whom enforcement is sought and must attach proof of such service to the application. If this had not been done the CCMA will on its own ensure that such party is made aware of the application. In terms of the LRAA of 2014, in particular section 115, the CCMA is required to assist the applicant by sending the notice of application to the party against whom enforcement is sought.

19.3.3 When sending the notice of application to the party against whom enforcement is sought the CCMA must enquire from such party whether the award was complied with. This may be done in writing or telephonically.

19.3.4 As soon as possible after the receipt of the notice of application consideration must be given to certification of the award.

19.3.5 On good cause shown, the CCMA may decline to certify the arbitration award.

19.3.6 In the event a rescission application is brought, it is the policy of the CCMA to stay the certification process until such time the rescission application has been determined.

19.3.7 A review application brought by the other party will not stay the certification of the award. Certification will be stayed only where the other party has brought an application to the Labour Court and the Labour Court has granted an order in terms of section 145 (3) of the LRA staying the enforcement of the award pending a review application.

19.4 How is an award to be enforced?

19.4.1 Once the award has been certified or made an order of the Labour Court and the other party still fails to comply with the award/order, the applicant may request the sheriff to execute.

19.4.2 The applicant may require the sheriff to attach property belonging to the other party and, if necessary, to sell it in execution. The sheriff's fees will however be for the applicant's account.

19.5 How is an award requiring the performance of an act other than payment of an amount of money to be enforced?

- 19.5.1 Once the award is certified, the party wishing to enforce must ensure that the other party is aware of the fact that the award was certified and this can, *inter alia*, be done by serving a copy of the certified award on such other party.
- 19.5.2 In cases of a failure to perform an act required in an award, the party wishing to enforce the award may do so by way of contempt proceedings instituted in the Labour Court.
- 19.5.3 The contempt proceedings should be instituted by way of notice of application supported by a founding affidavit.
- 19.5.4 In the founding affidavit the applicant should show that¹-
- An award was issued against the respondent and such award was certified;
 - The respondent was aware that the award was certified (It is best practice to serve the certified award on a respondent. If a respondent was merely informed about the existence of a certified award it must be shown that the respondent did not have any reasonable grounds for disbelieving the information);
 - The respondent has failed to comply with the award as certified;
 - The respondent was in wilful default and therefore in *mala fide* disobedience of the award.
- 19.5.5 The Labour Court will subpoena the party who had failed to comply with the certified award or Court order to appear before the Court.
- 19.5.6 In the absence of an acceptable explanation for the failure to comply with the award, the Labour Court may, *inter alia*, impose a fine or imprisonment. In some instances imprisonment is suspended on condition that the award is complied with within a specified time.⁹
- 19.6 May an award be rescinded after certification/ after being made an order of Court?**
- 19.6.1 The CCMA must entertain a rescission application even after the award has been certified or made an order of court in terms of section 158 of the LRA.
- 19.7 May interest be added in writs of execution?**
- 19.7.1 In terms of section 143 (2) if an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt unless the award provides otherwise.

- 19.7.2 It is not necessary to apply for a variation of the award to include interest as the interest is provided for in the LRA. The interest may be added to the amount specified in the award and the total may be reflected in the writ of execution.

19.8 When is it no longer possible to certify an award?

- 19.8.1 Once an award is issued, prescription runs and the award must be certified within 3 years so that it has the same status as a Labour Court order. An application to have the award certified in terms of 143 (3) must therefore be brought within three years, failing which the right to do so will have prescribed. The fact that the other party might have applied for the award to be reviewed would not make a difference as the fact that a review is pending is not a bar against certifying an award¹, unless a court order staying the execution is produced.

19.9 When is it no longer possible to make an award an order of the Labour Court?

- 19.9.1 The prescription period runs once an award is issued. An application to have the award made an order of the Labour Court must therefore be brought within three years of the issuing of the award, failing which the right to do so will have prescribed. The running of prescription is interrupted by a review application. The running of prescription can be interrupted by applying for the award to be made an order of court and applying further that the application be heard on the same day as the review application.

¹ *National Union of Mineworkers & others v BKH Mining Services CC trading as Dancarl Diamond Mine and others* (1999) 20 ILJ 85 (LC).

Chapter 20: INQUIRY BY ARBITRATOR

Contents

- 20.1 What is an inquiry by arbitrator?
- 20.2 Who can conduct this process and under what circumstances?
- 20.3 What is the procedure to be followed by the employer before the CCMA can conduct an inquiry by arbitrator?
- 20.4 Can an employer unilaterally invoke section 188A?
- 20.5 What are the responsibilities of the CCMA on receiving a LRA Form 7.19?
- 20.6 What are the powers of commissioners dealing with inquiries by arbitrators?
- 20.7 Who may represent a party at an inquiry by arbitrator?
- 20.8 What are the advantages and disadvantages of inquiries by arbitrators?
- 20.9 Is the arbitrator required to render a written award within a reasonable time?
- 20.10 Is an Inquiry by arbitrator considered an occupational detriment in terms of the Protected Disclosures Act?

20.1 What is an inquiry by arbitrator?

- 20.1.1 It is a process through which a dispute concerning allegations about an employee's conduct or capacity can be arbitrated. It is provided for by section 188A of the LRAA of 2014 and regulated by rule 34.¹

20.2 Who can conduct an inquiry by arbitrator and under what circumstances?

There are three circumstances under which the holding of an inquiry by arbitrator may be triggered - by consent if the employee is under the BCEA threshold; in the contract of employment if the employee is earning above the BCEA threshold; or by a collective agreement entered into between parties.

¹ LRAA of 2014

- 20.2.1 An Inquiry by arbitrator can be conducted by a council, an accredited agency or the CCMA usually on request of an employer.
- 20.2.2 Specific consent is only possible after the employee earning below the BCEA threshold¹ has been advised of the allegations concerning his/her conduct or capacity and with respect to a specific arbitration. The consent of an employee who earns less than the BCEA threshold must be obtained every time the employer desires to use the section 188A-procedure in respect of that employee, unless a binding Collective Agreement is in place.
- 20.2.3 Employees who earn above the BCEA threshold² are not required to be advised of the allegations, as consent is already contained in their contracts of employment.
- 20.2.4 Where parties have agreed in a collective agreement to conduct an inquiry by arbitrator, the definition of collective agreement as contained in section 213 of the LRA, as amended will apply.

20.3 What is the procedure to be followed by the employer before the CCMA can conduct an inquiry by arbitrator?

- 20.3.1 The employer must have delivered a completed LRA Form 7.19 to the CCMA;
- 20.3.2 The employee must have signed the prescribed form and indicated his consent to the inquiry by arbitrator unless a binding Collective Agreement is in place;
- 20.3.3 If the employee has agreed in a contract of employment to an inquiry by arbitrator, a copy of the contract must be attached to the prescribed form unless a binding Collective Agreement is in place;
- 20.3.4 The employer must have paid the prescribed fee. The fee may only be paid by bank guaranteed cheque or electronic transfer into the CCMA's bank account. Proof of payment must be attached to the prescribed form. The prescribed fee is R5 131.00 for each day or part thereof. The parties may agree amongst themselves to share the costs but it is the employer's responsibility to pay the prescribed fees to the CCMA.

20.4 Can an employer unilaterally invoke section 188A?

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¹ That is the amount determined by the Minister from time to time in terms of section 6(3) of the Basic Conditions of Employment Act, presently R -00 per annum.

² BCEA of 2014

20.4.1 Before an inquiry by arbitrator can be conducted an agreement must have been reached and therefore cannot be unilaterally invoked. The CCMA, council or agency will only appoint an arbitrator if the written consent of the employee or contract of employment or a copy of the Collective Agreement has been obtained.

20.5 What are the responsibilities of the CCMA on receiving a LRA Form 7.19?

20.5.1 The CMO responsible for section 188A-processes must -

- check that the employer has complied with the procedure outlined in 20.3 above. If there is a defect in the procedure, the CMO must return the request to the employer indicating what the defect is;
- send the notice of set down to the addresses of the parties within 7. days of receipt of the prescribed form and payment of the prescribed fee;
- ensure that the notice informs the parties of the date, time, venue of the process and the name of the commissioner; and ¹
- ensure that the parties have at least 7 days notice of the inquiry by arbitrator.

20.5.2 Once all the requirements are met, the CCMA will appoint an arbitrator. None of the parties may select or nominate an arbitrator.

20.5.3 The fee paid by the employer must be refunded if the CCMA has been informed that the dispute has been resolved or withdrawn before the notice of set down has been served on the parties.

20.6 What are the powers of a commissioner dealing with inquiry by arbitrator?

20.6.1 The appointed commissioner may conduct the arbitration in a manner that the commissioner considers appropriate to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities.²

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¹The CSC must appoint the arbitrator.

²Section 138 OF LRA

- 20.6.2 Each party must however be allowed to give evidence, call witnesses, cross-examine the witnesses of the other party and to address concluding arguments to the commissioner.
- 20.6.3 The arbitrator has all the powers conferred on a commissioner in terms of section 142 (1) (a) to (e) and (2) and (7) to (9).
- 20.6.4 Parties may agree on the documents to be handed in prior to the inquiry by arbitrator and should be encouraged to do so. If a party to a hearing is aware of a document which is in the possession of the other and is relevant to the issue to be determined, the provisions of section 142 (1) (b) of the LRA may be invoked to ensure that such document is produced at the hearing, especially when the opposing party refuses or fails to discover or produce relevant documents. This section allows the arbitrator to subpoena a witness and to order the witness to produce the required document.¹
- 20.6.5 The arbitrator must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, direct what action, if any, should be taken against the employee. (In the case of disciplinary matters, this means that the arbitrator must determine whether the employee's conduct has contravened a workplace rule or standard and, if so, what sanction would be fair and appropriate taking into account the employer's Code of Conduct and the provisions of the CCMA Guidelines: Misconduct Arbitrations as well as the Code of Good Practice: Dismissal.
- 20.6.6 The arbitrator's ruling has the same status as an award; is final and binding, not merely a recommendation and can be made an order of court. If the outcome of the arbitration is that the employee party is dismissed, the employee may not refer a dispute about it to the CCMA or a bargaining council. The ruling can however be taken on review to the Labour Court in terms of section 145 and it can also be rescinded on proper grounds.

20.7 Who may represent a party at an inquiry by arbitrator?

- 20.7.1 An employee party to the dispute may appear in person or be represented by a co-employee; or an office bearer or official of that party's registered trade union; or a legal practitioner by agreement between the parties or if permitted by the arbitrator in accordance with the rules regulating representation at an arbitration before the CCMA.
- 20.7.2 An employer party to the dispute may be represented by a director or employee, if the party is a juristic person; or an office bearer or official

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¹ The Labour Court confirmed that the process of discovery in the Labour Court had to be similar to that practiced in the High Court. See *SA Typographical Union & others v Republican Press (Pty) Ltd (1999) 20 ILJ 1602 (LC)*.

of that party's registered employers' organisation; or a legal practitioner by agreement between the parties of if permitted by the arbitrator in accordance with the rules regulating representation at an arbitration before the CCMA.

20.8 What are the advantages and disadvantages of an inquiry by arbitrator?¹

20.8.1 The main advantages are -

- The dispute is resolved speedily.
- The neutral outside arbitrator ensures impartial decision making;
- The employer does not have to concern itself with procedural issues since these are taken care of by the arbitrator;
- Finality is reached soon after the matter is referred to arbitration;
- No rehearing is possible unless there has been a successful review ordering a new hearing;
- Complex matters are handled more expertly than normal;
- Inquiries by arbitrators can be agreed upon in Collective Agreements.
- The costs associated with a hearing in the workplace as well as a hearing at arbitration are minimised.

20.8.2 The main disadvantages are-

- The outcome is out of the hands of the employer and where the employer believes continued employment is intolerable, the arbitrator may think otherwise;
- The parties are not able to choose who will arbitrate the dispute.

20.9 Is the arbitrator required to render a written award within a reasonable time?

20.9.1 The pre-dismissal arbitration is governed by section 138 and 142 and therefore the arbitrator is required to render a signed award, with brief reasons, in writing within 14 days of the process.

20.10 Is an inquiry by arbitrator considered an occupational detriment in terms of the Protected Disclosures Act?

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¹ Based on a contribution by Alan Rycroft.

In an instance where an employee in good faith alleges that the holding of an inquiry contravenes the Protected Disclosures Act of 2000 (PDA), the employee or employer may require that an inquiry in terms of section 188A be conducted into the allegations of misconduct or incapacity.

The holding of an inquiry by arbitrator in terms of section 188A and the suspension of an employee on full pay pending the outcome of such inquiry does not constitute an occupational detriment as envisaged in terms of the PDA.

Chapter 21: Review of arbitration awards

Contents

- 21.1 What is the difference between an appeal and a review?
- 21.2 What are the grounds of review in terms of the LRA?
- 21.3 When does a commissioner commit misconduct?
- 21.4 What does 'gross irregularity in the conduct of the arbitration' mean?
- 21.5 When does a commissioner 'exceed the commissioner's powers'?
- 21.6 What does it mean to 'permit an award to be improperly obtained'?
- 21.7 Does an application for the review of a commissioner's ruling during an arbitration stay the arbitration proceeding pending the review?
- 21.8 Does an application for the review of a commissioner's award stay the enforcement of the award pending the review?
- 21.9 Appeals in terms of EEA.

21.1 What is the difference between an appeal and a review?

- 21.1.1 An appeal is a process where a higher court or tribunal changes the decision of a lower court or tribunal should it come to different conclusions as to findings of law and facts. CCMA awards are not subject to appeal with two exceptions:
 - Section 24(7) of LRA
 - Section 10(8) of EEA
- 21.1.2 CCMA and bargaining council awards are subject to review by the Labour Court. On review the overriding consideration is whether the decision reached by the arbitrating commissioner is one that a reasonable decision-maker could not reach.

21.2 What are the grounds for review in terms of the LRA?

- 21.2.1 An arbitration award may be reviewed in terms of section 145 if there is a 'defect' in the arbitration proceedings.
- 21.2.2 A defect means that –

- the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator;
- the commissioner committed a gross irregularity in the conduct of the arbitration proceedings; or
- the commissioner exceeded the commissioner's powers; or that
- an award has been improperly obtained.

21.3 When does a commissioner commit misconduct?

21.3.1 Misconduct in this context has been said to denote some moral wrongdoing¹.

21.3.2 Examples of misconduct by a commissioner are bias, gross negligence, a gross mistake of law or fact or acting in bad faith.

21.4 What does a 'gross irregularity in the conduct of the arbitration' mean?

21.4.1 An irregularity must be 'gross' in order to amount to a defect – that is, it must be material² and prevent a fair hearing³.

21.4.2 The Labour Court has found the following to be a gross irregularity⁴ –

- A refusal to grant postponement where postponement is appropriate⁵;
- Conciliating a dispute at arbitration stage when both parties have not consented to the conciliation;
- CCMA refusing to allow a party to cross-examine a witness;
- An award which is incomprehensible;
- A failure to determine the dispute;
- Making a finding not based on evidence; and
- Completely misunderstanding the evidence.

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¹ *Mutual and Federal Insurance Co Ltd v CCMA* [1997] 12 BLLR 1610 (LC)

² *Reunert Industries (Pty) Ltd v Naicker* (1997) 12 BLLR 1632

³ *County Fair Foods (Pty) Ltd v CCMA* (1999) 20 ILJ 2609

⁴ These are examples and not a closed list

⁵ *Intersite Property Management Services v Khululekile Mchuba & Others (JR 1343/2011)* [2013] ZALCJHB 217 (handed down on 13 August 2013)

21.5 When does a commissioner 'exceed the commissioner's powers'?

21.5.1 When the commissioner makes an award which he or she does not have the power to make, he/she exceeds his/her powers. A commissioner has been held to exceed his/her powers in the following situations¹-

- Committing a material error of law;
- Arbitrating a dispute which has been referred as an unfair labour practice as if it were an unfair dismissal dispute;
- Failing to apply the proper test when interpreting statutes, case law or evidence;
- Making a finding not based on the evidence.
- A finding that the CCMA has jurisdiction when in fact and law it does not;

21.6 What does it mean to 'permit an award to be improperly obtained'?

21.6.1 A commissioner has issued an award that has been induced by improper factors such as a bribe or a favour.

21.7 Does an application for review of a commissioner's ruling during an arbitration stay (stop) the arbitration proceedings pending the review?

21.7.1 The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings before the issue in dispute has been finally determined by the CCMA. There is one exception-if the Labour Court is of the opinion that it is just and equitable to do so.

21.8 Does an application for review of a commissioner's award stay the enforcement of the award pending the review?

If the applicant party wishes to stay the enforcement of an award pending the review, the applicant party must make an application to the Labour Court for an interdict to stay the enforcement of the award.

¹ These are examples and not a closed list

21.9 Appeals in terms of EEA

21.9.1 An applicant in a discrimination case relating to sexual harassment or for any other unfair discrimination case arbitrated by the CCMA (where an employee earning below the BCEA threshold has elected arbitration) may apply to the Labour Court for an appeal against the award.

21.9.2 The application for an appeal must be lodged with the Labour Court within 14 days of the date of the award. This period may be extended by the court on good cause shown.¹

¹ Section 10(8) of the EEA

Chapter 22: Contempt of the Commission

Contents

- 22.1 What constitutes contempt of the CCMA?
- 22.2 What procedure should be followed before making a finding of contempt during conciliation or arbitration proceedings?
- 22.3 What procedure should be followed after a finding that contempt of the CCMA was committed?
- 22.4 What could be done to avoid/discourage contempt of the CCMA?

22.1 What constitutes contempt of the CCMA?

- 22.1.1 Generally, in relation to a court of law, contempt of court is committed when a person unlawfully and intentionally violates the dignity, repute or authority of a judicial body or interferes in the administration of justice in a matter pending before such body.¹ This chapter focuses on contempt of the CCMA within the context of the LRA, which contains provisions designed to ensure the dignity, repute and authority of the CCMA.
- 22.1.2 Section 142 (8) of the LRA provides that a person commits contempt of the CCMA -
 - if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend at the time and place stated in the subpoena;
 - if, after having appeared in response to a subpoena, that person fails to remain in attendance until excused by the commissioner;
 - by refusing to take the oath or to make an affirmation as a witness when a commissioner so requires;
 - by refusing to answer any question fully and to the best of that person's knowledge and belief, and such refusal is not because the person claims he or she is prohibited from doing so due to legal privilege;
 - if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a commissioner;

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¹ Definition taken from Milton South African Criminal Law and Procedure Vol II: Common Law Crimes, 3rd edition Cape Town, Juta and Co: 1996,164

- if a person wilfully hinders a commissioner in performing any function conferred by or in terms of the LRA;
- if a person insults, disparages or belittles a commissioner, or prejudices or improperly influences the proceedings or improperly anticipates the commissioner's award;
- by wilfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during those proceedings; and
- by doing anything else in relation to the CCMA which, if done in relation to a court of law, would have been contempt of court.

22.1.3 In terms of section 143 (4) of the LRA, if a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court. This was dealt with in Chapter 19 dealing with enforcement of awards.

22.1.4 It is to be noted that contempt of the CCMA normally relates to either –

- conduct during the proceedings; and/or
- conduct after the proceedings when a party fails or refuses to comply with a certified award requiring the performance of an act other than the payment of money.¹

22.1.5 It is only in respect of contempt relating to conduct during the proceedings that a commissioner may make a finding of contempt. In cases of contempt relating to a failure to perform an act required in a certified award, the applicant may enforce the award by way of contempt proceedings instituted in the Labour Court, as such awards become enforceable as if they were orders of the Labour Court upon certification by the Director of the CCMA.²

22.2 What procedure should be followed before making a finding of contempt during conciliation or arbitration proceedings?

22.2.1 In terms of section 142 (9) (a) a commissioner may make a finding that a party is in contempt of the CCMA for any of the reasons referred to in paragraph 22.1.2 above.

22.2.2 Neither the LRA nor the rules contain any provision regarding the procedure to be followed before a finding of contempt may be made but it is suggested that commissioners should where possible give warnings that a finding of contempt would be considered if

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¹ Awards for the payment of money are enforced through writs of execution.

² See section 143 (4) read with section 143 (1) of the LRA

contemptuous conduct is persisted with and should where possible give the person concerned an opportunity to reflect and/or to address the commissioner on whether or not a finding of contempt of the CCMA should be made. Some acts of contempt may however be of such a nature that no warning is required and that there is no need for allowing a person an opportunity to state a case e.g. in a case where the commissioner is assaulted.

22.2.3 Generally, the kind of contemptuous behaviour where a commissioner should consider warning a person of the consequences of persisting with such behaviour and allowing an opportunity for reflection, includes the following-

- refusing to take the oath or to make an affirmation as a witness;
- refusing to answer questions fully;
- failing to produce any book, document or object specified in a subpoena;
- less serious hindering of a commissioner in the performance of the commissioner's functions; and
- less serious forms of contemptuous behaviour during proceedings.

22.2.4 Generally, the kind of contemptuous behaviour where a commissioner should allow a person an opportunity to address him/her on whether certain conduct constitutes contempt of the CCMA, includes the following-

- failing to produce a book, document or object, as it is possible that the person might show good cause for such failure;
- refusing to take the oath or to make an affirmation as a witness, as there might be reasons for the refusal;
- refusing to answer questions fully as it may, for example, be shown that it is due to legal privilege;
- wilfully hindering a commissioner in performing any function, as it might be in dispute whether an act amounted to hindering and/or whether it was wilful;
- insulting, disparaging or belittling a commissioner, or prejudicing or improperly influencing the proceedings or improperly anticipating the commissioner's award, as it might be in dispute whether an act constitutes such conduct and whether it was intentional; and

- wilfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during the proceedings, as it might be in dispute whether the act constituted such conduct or whether the act was wilful.

22.2.5 The proceedings must be recorded even if it arises during a conciliation process.

22.2.6 The person concerned should be permitted representation and this includes legal representation.

22.2.7 The commissioner's discretion to determine whether conduct amounts to contempt must be exercised with "caution and restraint."¹

22.2.8 After carefully considering the person's representations, the commissioner must make a written finding (with reasons) whether or not he/she committed contempt of the CCMA.

22.2.9 The finding should not include any sanction as the sanction is to be determined by the Labour Court.

22.3 What procedure should be followed after a finding that contempt of the CCMA was committed?²

22.3.1 In terms of section 142 (9) (b) of the LRA a commissioner may refer the finding together with the record of the proceedings to the Labour Court for its decision which may include-

- the confirmation of the finding;
- variation of the finding;
- making any order that is deemed to be appropriate, such as, the imposition of a sanction and the suspension of the right of a person, other than a legal representative, to represent a party in the CCMA and the Labour Court; or
- the setting aside of the finding.

22.3.2 The referral must be done by way of an ex parte application, supported by a founding affidavit, which must, *inter alia*, indicate the relief sought. If a contempt ruling has been made, the ruling together with the record of the proceedings (and the subpoena and proof of service, if applicable) must immediately be forwarded to the office of

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¹ National Bargaining Council for the Road Freight Industry v Myer t/a Oakley Carriers [2002] 5 BLLR 604 (LC)

² See Bargaining Council for the Clothing Manufacturing Industry & another v Prinsloo [2007] 9 BLLR 825 (LC)

the NSC Legal Services for attention. The notice of application will be prepared and filed with the Labour Court by the office of the NSC Legal Services.

The Registrar of the Labour Court will set the matter down for hearing.

- 22.3.3 The commissioner must be represented by a representative appointed by the CCMA at the Labour Court.
- 22.3.4 The sanction that may ultimately be imposed includes suspension from appearing in any labour dispute resolution forum (in the case of a person other than a legal practitioner), a fine, or in extreme cases, imprisonment. In the case of legal practitioners the Court may refer the matter to the Law Society or the Society of Advocates (as the case may be) to consider whether further action should be taken against the practitioner concerned.

22.4 What could be done to avoid/discourage contempt of the CCMA?

- 22.4.1 Commissioners are expected to deal with matters where strong feelings and impassioned senses of grievance or persecution may arise. They are expected to deal with these and behaviour consequent thereupon robustly, with patience and a measure of stoicism.¹
- 22.4.2 Some instances of contempt of the CCMA arose because the commissioner had become involved in an argument with the party concerned, because the commissioner had raised his/her voice, or because a commissioner had not dealt with an objection decisively. Generally, commissioners should avoid behaviour on their part that may be interpreted by a party as offensive. Commissioners should at all times remain calm and objective. They should avoid becoming involved in arguments with any party. In the case of objections, commissioners should listen to the objections attentively and thereafter make a ruling and give clear reasons for it. In most cases where there are emotional outbursts, commissioners earn respect by not reacting to them.
- 22.4.3 Commissioners should control processes in such a way that the likelihood of contemptuous behaviour is minimised. Where a party starts to behave in a manner that is bordering on contempt, commissioners should not allow the situation to escalate. The attention of the party should calmly be drawn to the provisions of section 142 and such party should be notified of the respects in which the conduct is perceived to border on contemptuous behaviour. It is

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¹ National Bargaining Council for the Road Freight Industry v Myer t/a Oakley Carriers (above) at 615

generally advisable to take a short adjournment to allow a party to calm down and to consider the consequences of persisting with such behaviour. Generally, such steps have the desired effect and it is then not necessary for further measures to be taken.

Chapter 23: Facilitation of retrenchments in terms of section 189A of the LRA

Contents

- 23.1 What statutory provisions and Regulations govern facilitation of retrenchments?
- 23.2 Under what circumstances do the statutory provisions and the Regulations apply?
- 23.3 Who may request facilitation?
- 23.4 How may facilitation be requested?
- 23.5 How must the CCMA deal with a request for facilitation?
- 23.6 What is the effect of the appointment of a facilitator, what is the time frame within which the facilitation should take place and what are the advantages for parties to participate?
- 23.7 What are the powers and duties of the facilitator during a section 189A facilitation process?
- 23.8 What limitations are placed on the number of facilitation meetings that may be held?
- 23.9 How should disputes concerning disclosure of information be determined?
- 23.10 How should the substantive issues generally be dealt with during the facilitation?
- 23.11 What are the duties of the facilitator at the end of the facilitation?
- 23.12 If section 189A applies, when is it possible for an employer party to give lawful notice of termination of employment?
- 23.13 If section 189A applies, when may employees embark on a strike concerning a section 189 (3) notice?
- 23.14 What are the consequences of electing to strike?

23.1 What statutory provisions and Regulations govern facilitation of retrenchments?

- 23.1.1 Section 189A of the LRA provides that the CCMA must, in certain specified circumstances, appoint a facilitator to assist parties engaged in consultations concerning possible retrenchments and

deals with the circumstances under which the section would apply and the effect of facilitation.

- 23.1.2 The Facilitation Regulations (“the Regulations”) promulgated in terms of section 189A (6) deal with the procedure to be followed, the powers and functions of a facilitator, disclosure of information and the status of facilitation proceedings.

23.2 Under what circumstances do the statutory provisions and the Regulations apply?¹

- 23.2.1 The employer must employ more than 50 employees;
- 23.2.2 The employer must contemplate dismissing at least the relevant number of employees specified in section 189A (1) (a), e.g. 10 employees if the employer employs up to 200 employees; 20 employees if the employer employs more than 200 but not more than 300 employees etc.
- 23.2.3 The number of employees that the employer contemplates dismissing together with the number of employees retrenched during the 12 months preceding the notice inviting consultations, must be equal to or more than the relevant number mentioned in section 189A (1) (a).

23.3 Who may request facilitation?²

- 23.3.1 An employer employing more than 50 employees and contemplating dismissing at least the relevant number of employees referred to in section 189 A (1) (a); and/or
- 23.3.2 Consulting parties representing the majority of employees whom the employer contemplates dismissing; and/or
- 23.3.3 Parties to an agreement to appoint a facilitator.

23.4 How may facilitation be requested?

- 23.4.1 If the employer requests facilitation it must do so in its section 189 (3) notice.³
- 23.4.2 If the consulting party/parties representing the majority of employees whom the employer contemplates dismissing are to request the

¹ Section 189A (1).

² Section 189A (3) and (4).

³ Section 189A (3) (a).

facilitation, it/they must notify the CCMA within 15 days of receiving the section 189 (3) notice.⁴

- 23.4.3 A request for facilitation must be made by completing LRA Form 7.20 and by serving it on the other parties in terms of the CCMA Rules and by filing it with the CCMA.
- 23.4.4 Proof of service on the other parties must be attached to the request for facilitation when it is filed with the CCMA.

23.5 How must the CCMA deal with a request for facilitation?

- 23.5.1 Place the CCMA date stamp on the request to serve as proof when it was received.
- 23.5.2 Check whether facilitation may be requested, i.e. whether the requirements referred to in 23.2 above were met.
- 23.5.3 If the request is not made in accordance with an agreement between the consulting parties, check whether the facilitation was properly requested and in particular-
- if the request is by the employer, whether it was made in the section 189 (3) notice;
 - if the request is by the employee consulting party/parties representing the majority of employees who the employer contemplates dismissing, whether it was made within 15 days of them receiving the section 189 (3) notice;
 - whether proof of service on the other parties was attached to the request; and
 - whether the LRA Form 7.20 was properly completed.
- 23.5.4 If the request was not properly made, telephonic attempts must be made to get the parties to agree to facilitation. Any such agreement must be reduced to writing and be signed on behalf of all parties. In the event of such agreement, the requirements referred to in the preceding paragraph need not be met. If the request was not properly made and such agreement cannot be secured, the request should be returned to the requesting party with an indication of the nature of the defect so that it may be rectified, if possible.
- 23.5.5 Within seven days of receiving the request for facilitation, the parties must be consulted regarding a date for the first facilitation meeting. All parties must as far as possible be accommodated so as to ensure

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⁴ Section 189 A (3) (b).

that all the affected employees as well as the employer are represented at the first facilitation meeting. The consultation may be done telephonically but notes should be kept in the relevant file regarding the persons who were consulted and what the gist of the consultation was.

- 23.5.6 Within seven days of receipt of the request for facilitation, a facilitator on the CCMA panel of facilitators must be identified. The Region must inform the Employment Security Unit of the parties, the number of proposed retrenchments and the identified facilitator. The ESU Head will approve or decline the appointment of that facilitator.
- 23.5.7 Within seven days of receiving the request for facilitation, the CCMA must notify the parties in writing of the name of the facilitator and the date of the first facilitation meeting.
- 23.5.8 The parties must be given at least seven days notice of the first facilitation meeting unless all parties have agreed to an earlier date.

23.6 What is the effect of the appointment of a facilitator, what is the time frame within which the facilitation should take place and what are the advantages for parties to participate?

- 23.6.1 In respect of a dismissal covered by section 189A an employer must give notice of termination of employment in accordance with the provisions of the section.⁵ A failure to do so would therefore be unlawful.
- 23.6.2 If a section 189A facilitator is appointed and the 60-day facilitation period (or as extended) is completed, the union or employees may refer a dispute about the fairness of the reason for the dismissals to the Labour Court for adjudication, or they may give 48 hours notice of their intention to embark upon a protected strike concerning the proposed retrenchments (or seven days in the case of a dispute where the State is the employer party)..
- 23.6.3 If a section 189A facilitator is not appointed, a union may not refer a dispute concerning the proposed retrenchments for conciliation unless a period of 30 days has lapsed since the date on which the section 189 (3) notice was given.⁶ The idea behind this is that the parties to the dispute should engage in a consultation process during the 30 day period. A further 30 day period is allowed for conciliation, it is therefore to be expected that it would generally take about 60 days for the consultation and conciliation processes to be completed. If a dispute about proposed retrenchments is referred for conciliation, the employer may only give notice of termination of employment after a

⁵ Section 189A (2) (a).

⁶ Section 189A (8).

certificate is issued that the matter remains unresolved or on expiry of 30 days after the referral for conciliation was made.

- 23.6.4 The facilitation process may totally or partly be used as a substitute for the consultation and conciliation processes referred to in the preceding paragraph. If a facilitator is appointed, 60 days from the date of the issue of the section 189 (3) notice, are allowed for facilitation.⁷ Where a facilitator is appointed the employer may only give notice to terminate the contracts of employment after the expiry of the said 60 day period. The timeframe within which facilitation should take place is therefore the period between the date set for the first meeting and the date on which 60 days would have expired since the section 189 (3) notice, or such longer period as the parties may agree to.
- 23.6.5 Should the employer party issue the notices of termination of employment or if it dismisses employees earlier than the period allowed for conciliation or facilitation, a notice of the commencement of a strike (48 hours or seven days notice as the case may be), may be given immediately and a strike may be embarked upon on expiry of the notice period.⁸
- 23.6.6 Provided that they or their union had not given notice of a strike in respect of their dismissals, employees who dispute the fairness of the reason for a dismissal for operational requirements have the right to refer a dispute about the fairness of the reason for a dismissal for operational requirements to conciliation and, if it remains unresolved, to adjudication by the Labour Court. Had they participated in either the conciliation or the facilitation processes referred to above, they need not again refer a dispute about the fairness of the reason for their dismissals for conciliation but may refer it directly to the Labour Court for adjudication on receipt of a notice of termination of employment.
- 23.6.7 Therefore the effect of the appointment of a facilitator and the facilitation process is that-
- the consultation required by section 189 (1) may be done during the facilitation;
 - notices of termination of contracts of employment given by the employer party, are of no effect and the employer party may not lawfully terminate employment for operational requirements if such notices of termination were given within 60 days of the section 189 (3) notice being given;

⁷ Section 189 A (7).

⁸ Section 189A (9).

- should such unlawful notices of termination be given, employees may elect whether to embark upon a protected strike (after giving the required notice) or whether to immediately refer a dispute about the fairness of the reason for the dismissal to the Labour Court for adjudication; and
- further conciliation (following a section 189A facilitation process) is not required before a strike notice may be given or before referring a dispute about the fairness of the reason for the dismissal to the Labour Court for adjudication.

23.6.8 The advantages of the facilitation process are-

- The parties are guided as to the procedure to be followed by an experienced facilitator;
- Mediation does not only take place at the end of the consultation process but on an ongoing basis during the process;
- Disputes about procedure are resolved expeditiously and without delaying the consultation process thereby diminishing the possibility of mandamus and interdict proceedings envisaged by section 189A (13);
- Disputes about the disclosure of information are resolved expeditiously and without delaying the consultation process;
- Participation in the facilitation process increases the possibility that retrenchment may be avoided or minimised or that termination of employment may be by consent;
- The facilitation process compensates for the employer party having to face the possibility of a strike and the employee party no longer having the right to challenge the procedural fairness of a dismissal other than by way of mandamus and interdict proceedings.

23.7 What are the powers and duties of the facilitator during a section 189A facilitation process?

23.7.1 The “with prejudice” stages of the facilitation meeting must be recorded.

23.7.2 The commissioner must assist the parties to reach an agreement on-

- the procedure to be followed during the facilitation;
- the date and time of additional facilitation meetings; and

- the information to be disclosed in terms of section 189 (3) (a).
- 23.7.3 If no agreement is reached, the Facilitator may decide any issue of procedure that arises in the course of meetings between the parties.
- 23.7.4 The commissioner must explain the procedure to the parties.
- 23.7.5 The facilitator should clarify the stages of the facilitation to be conducted on a “with prejudice” basis and the stages to be conducted on a “without prejudice” basis.
- 23.7.6 The Facilitator should arrange further facilitation meetings after consultation with the parties; and may direct that the parties engage in consultations without the facilitator being present.
- 23.7.7 If employees likely to be affected by a proposed dismissal are represented by more than one consulting party, an agreement relating to the issues referred to in the preceding paragraph and an agreement varying the time period for facilitation or consultation, will be binding on the other consulting parties representing employees, if concluded with the consulting parties representing the majority of the employees concerned.⁹
- 23.7.8 If no agreement can be reached regarding the procedure, the commissioner must decide what procedure is to be followed after giving the parties an opportunity to make submissions about it.¹⁰
- 23.7.9 If the parties cannot reach agreement regarding dates and times for additional facilitation meetings, the commissioner must decide the date and time of additional facilitation meetings after consulting the parties.¹¹
- 23.7.10 If the parties fail to reach agreement regarding the information to be disclosed, the commissioner may, after hearing representations from the parties, make an order directing the employer party to produce documents that are relevant to the facilitation.¹²

23.8 What limitations are placed on the number of facilitation meetings that may be held?

- 23.8.1 In terms of Regulation 6 a facilitator must conduct up to four facilitation meetings unless the dispute is settled in a lesser number

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⁹ Regulation 10 read with section 189A (2) (c).

¹⁰ Regulation 3 (1) (a) read with regulation 4 (1) (b).

¹¹ Regulation 3 (1) (b) read with regulation 4 (1) (c).

¹² Regulation 3 (1) (c) read with regulation 5.

of meetings or unless the parties agree to a lesser number of meetings.

23.8.2 The Director, in consultation with the facilitator, may increase the number of meetings.

23.8.3 The four facilitation meetings referred to in paragraph, do not include meetings convened for the purposes of the facilitator arbitrating a dispute over the disclosure of information.

23.8.4 In terms of the LRA amendment to s189A (2), a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation. If a party refuses to extend the consultation period, the commissioner should try to mediate this issue. If there is still no agreement, the facilitator should rule on whether the refusal to extend is reasonable.

23.9 How should disputes concerning the disclosure of information be determined?

23.9.1 If there is a dispute about disclosure of information in a section 189A matter, the facilitator should first try to mediate the issue.

23.9.2 Regulation 5 envisages an informal process where the issue is decided after the hearing of representations but, if that is impractical, commissioners may hear oral evidence and allow cross-examination provided that the facilitation may not thereby be unduly delayed.

23.9.3 It is not necessary that the dispute regarding the disclosure of information formally be referred to the CCMA as would be the case if the dispute did not arise during the facilitation process.¹³

23.9.4 The commissioner must first decide whether or not the information is relevant, in other words, whether it is required to enable the relevant consulting party to engage effectively in the consultation process.¹⁴ The onus is on the employer party to prove that any information that it has refused to disclose is not relevant for the purpose for which it is sought.¹⁵

23.9.5 Furthermore, the commissioner must decide whether the employer is by virtue of the provisions of section 16 (5) not required to disclose the information, in other words-

- whether the information is legally privileged;

¹³ Regulation 5 (2) indicates that sections 16 (6) to (9) of the LRA do not apply.

¹⁴ Section 16 (10).

¹⁵ Section 189 (4).

- whether the employer cannot disclose the information without contravening a prohibition imposed on the employer by any law or order of any court;
- whether the information is confidential and, if disclosed, may cause substantial harm to an employee or the employer; and
- whether the information is private information relating to an employee who did not consent to the disclosure of that information.

23.9.6 If the information is relevant but confidential or private, the commissioner-

- must balance the harm that the disclosure is likely to cause to the employer against the harm that the failure to disclose the information is likely to cause to the ability of the employee consulting party requesting the information, to effectively engage in consultation;¹⁶
- must decide whether or not the balance of the harm favours the disclosure of the information and, if so, order the disclosure of the information;¹⁷
- may order disclosure unconditionally or on terms designed to limit the harm likely to be caused to an employee or the employer;¹⁸
- must take into account any previous breach of confidentiality in respect of information disclosed in terms of section 16 at that workplace and may refuse to order the disclosure for that reason.¹⁹

23.9.7 If a dispute about an alleged breach of confidentiality arises during the facilitation the commissioner may hear representations and/or oral evidence concerning the dispute and, if appropriate, may make an order withdrawing the right to disclosure of information in that workplace for a period of time. For example, the right to further information relating to confidential and personal information may be withdrawn for the duration of the facilitation or for a more limited period.

23.10 How should the substantive issues generally be dealt with during a facilitation?

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¹⁶ Section 16 (11).

¹⁷ Section 16 (12).

¹⁸ Section 16 (12).

¹⁹ Section 16 (13).

- 23.10.1 Each consulting party should at the outset be given an opportunity to indicate who they represent during the facilitation.
- 23.10.2 The employer party and the other parties should engage in a meaningful joint consensus-seeking process and attempt to reach agreement on-
- appropriate measures (i) to avoid dismissals, (ii) to minimise the number of dismissals; (iii) to change the timing of the dismissals and (iv) to mitigate the adverse effects of the dismissals;
 - the method for selecting the employees to be dismissed; and
 - the severance pay for dismissed employees.²⁰
- 23.10.3 After the procedure to be followed during the facilitation is agreed, the employer party should generally be allowed an opportunity to make an opening statement explaining the matters set out in its section 189 (3) notice; elaborating on it and indicating what information it requires from the other consulting parties. Where the consultation process has already commenced prior to the facilitation, the employer party should be given an opportunity to explain what consultation had already taken place, what agreements, if any, had already been reached and what issues are still in dispute.
- 23.10.4 The other consulting parties should thereafter be given an opportunity to respond to the employer party's opening statement to explain what issues are in dispute, their position relating to such issues and what information, if any, is further required.
- 23.10.5 During the process referred to in the two preceding paragraphs, the parties should be required to indicate whether there are collective agreements governing the issues and to make copies of such collective agreements available.
- 23.10.6 Sharing of information should then take place and, if necessary, the facilitator must make rulings regarding the information to be supplied, after hearing representations from the parties or oral evidence and argument, if necessary.
- 23.10.7 The facilitator should as far as possible assist the parties to identify the possible bases on which consensus may be reached. This may be done during separate caucuses with the consulting parties.
- 23.10.8 The facilitator should play a proactive role in assisting the parties to find ways to avoid or minimise retrenchments. This may include interrogating the reason for retrenchments, making proposals on

²⁰ Section 189 (2).

alternatives to retrenchment and partnering with other organisations and/or government departments to assist in turning the business around.

- 23.10.9 If requested, parties should be allowed time to make information available and/or to obtain mandates from their principals/members. In practice, the process takes place over a number of days, with employee representatives being allowed sufficient time to meet with the employees to convey information to them, to take instructions from them and to obtain mandates from them.
- 23.10.10 The facilitator should act as a mediator and should assist the parties to reach consensus on as many issues as possible.
- 23.10.11 If no agreement can be reached on any matter referred to in section 189 (2), (3) and (4) or any other matter relating to the proposed dismissals, the other consulting parties must be allowed an opportunity to make representations to the employer party about it.²¹
- 23.10.12 The employer party must be required to consider and respond to the representations made by the other consulting parties and, if the employer party does not agree with it, it must be required to state the reasons for disagreeing. If any representation was in writing, the employer party must respond in writing.²²
- 23.10.13 If no agreement regarding termination of employment is reached and the employer party decides to dismiss employees, it must select the employees to be dismissed according to selection criteria-
- that have been agreed to by the consulting parties; or
 - if no criteria have been agreed, criteria that are fair and objective.²³
- 23.10.14 If agreement is reached regarding any issue that was the subject of consultation, including an agreement regarding the termination of employment, such agreement must be reduced to writing and signed by the representatives of all the consulting parties who are parties to the agreement.
- 23.10.15 Any agreement as to the resolution of a possible dispute about the fairness of the reason for dismissals, must also be reduced to writing and be signed by all parties to the agreement.

²¹ Section 189 (5).

²² Section 189 (6).

²³ Section 189 (7).

23.11 What are the duties of the facilitator at the end of the facilitation?

23.11.1 The facilitator should at the conclusion of the facilitation process complete the section 189A Comprehensive Outcome Report. This should be forwarded to the Employment Security Unit and a copy placed on file.

23.11.2 Facilitators should advise the employee representatives of the employees' rights to elect whether to embark upon a strike or to refer a dispute to the Labour Court if they are challenging the reason for retrenchments, and of the consequences of making such election as set out in section 189A (10).

23.11.3 Parties should be encouraged to continue with efforts to resolve matters by agreement without delaying the statutory dispute resolution processes.

The facilitator should assist retrenched workers to access support mechanisms such as counselling, Department of Labour, Public Employment Services; UIF benefits etc.

23.12 If section 189A applies, when is it possible for an employer party to give lawful notice of termination of employment?

If a facilitator is appointed, a period of 60 days calculated from the date of the section 189(3) notice must have expired.²⁴

If a facilitator is not appointed, the period envisaged by section 64 (1) (a) must have elapsed.²⁵ This means that the employer should itself refer a dispute (unless there is agreement on the retrenchment) and wait the 30-day period for conciliation.²⁶

23.13 If section 189A applies, when may employees embark on a strike concerning a section 189 (3) notice?

If a facilitator is appointed, a registered union or employees who received notice of termination of employment may commence a strike on 48 hours notice after receiving notice of termination of employment.²⁷ In the case of State employees at least seven days notice must be given after receiving such notice of termination of employment. Notice of the commencement of a strike may be given even if the 60 day period calculated from date of the section

²⁴ Section 189A (7) (a).

²⁵ Section 189A (8) (b).

²⁶ See section 189A (8) (a).

²⁷ Section 189A (7) (b).

189 (3) notice had not expired, if the employer dismisses or gives notice of dismissal within the 60 day consultation period.²⁸

If a facilitator is not appointed the union or the employees who received notice of termination of employment may give 48 hours notice of the commencement of a strike once the periods mentioned in section 64 (1) (a) have elapsed. In the case of State employees seven days notice must be given after such period has elapsed. This means that such union or employees must refer a dispute concerning the section 189 (3) notice to the CCMA for conciliation. Such referral may only be made when a period of 30 days from the date of the section 189 (3) has lapsed. A certificate of non-resolution must have been issued or 30 days must have expired since the referral before the strike notice may be issued. Notice of the immediate commencement of a strike may, however, be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in section 64 (1) (a), i.e. before a certificate is issued and before a period of 30 days has expired after the referral.

Irrespective whether or not a facilitator was appointed, a consulting party may not give notice of a strike in terms of section 189A in respect of a dismissal if it has referred a dispute concerning whether there was a fair reason for the dismissal to the Labour Court for adjudication.

23.14 What are the consequences of electing to strike?

A consulting party may not refer a dispute about whether there is a fair reason for a dismissal to the Labour Court if it has given notice of a strike in terms of section 189A in respect of that dismissal. If such party is a trade union that also applies to its members.

If a trade union gives notice to strike after referring a dispute concerning whether there is a fair reason for the dismissal to the Labour Court for adjudication such referral is deemed to be withdrawn.

²⁸ Section 189A (9).

Chapter 24: Interventions in disputes envisaged by section 150

Contents

- 24.1 What statutory provisions govern section 150 interventions?
- 24.2 Under what circumstances may the CCMA intervene in disputes that have never been referred to it?
- 24.3 Under what circumstances may the CCMA intervene in disputes where it or a bargaining council had already issued a certificate that the dispute remained unresolved, or where the 30 day period for conciliation had already expired?
- 24.4 Who may authorise a section 150 intervention?
- 24.5 How is an offer of assistance processed through the CCMA?

24.1 What statutory provisions govern section 150 interventions?

- 24.1.1 Section 150 of the LRA provides that the CCMA may offer to appoint a commissioner to attempt to resolve public interest disputes through conciliation in specified circumstances where it would not otherwise have had jurisdiction to conciliate.
- 24.1.2 Two categories of disputes are dealt with in the section namely –
 - disputes that were never referred to the CCMA or bargaining council¹;
 - disputes that were referred to the CCMA or a bargaining council;

24.2 Under what circumstances may the CCMA intervene ?

- 24.2.1 The Director may appoint one or more commissioners to attempt to resolve such disputes through conciliation if –
 - all the parties consent to the appointment of a commissioner; and
 - in the absence of consent, the Director believes resolution of the dispute is in the Public Interest.
- 24.2.2 In cases where a party embarks upon a strike or lock-out without having referred the dispute for conciliation the Director may offer to

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¹ Section 150 (1).

appoint a commissioner to conciliate the dispute in terms of these provisions.

24.3 Under what circumstances may the CCMA intervene in disputes where it or a bargaining council had already issued a certificate that the dispute remained unresolved or where the 30 day period for conciliation had already expired?

24.3.1 All that is required is that all parties to the dispute consent or the Director believes it is in the public interest to appoint a commissioner to attempt to resolve the dispute through conciliation in terms of these provisions.

24.3.2 The Director must consult the parties to the dispute; and if it involves a Bargaining Council, the secretary of the council with jurisdiction over the dispute.

24.4 Who may authorise a section 150 intervention?

24.4.1 In the case of all disputes, e.g. where the dispute exists in numerous branches of a national company in different provinces or limited to a province, the intervention may only be authorised by the Director or the National Senior Commissioner: Mediation and Collective Bargaining.

24.5 How may an offer of assistance be processed through the CCMA?

24.5.1 A s150 intervention may be processed in the following manner in the preferred format attached below:

- Upon request of all or any of parties;
- Upon an offer by the CCMA and acceptance thereof by the parties;
- Consent must be in writing and signed by all parties;
- In the absence of consent if instructed by the Director if it is in the Public Interest.

Dear Sir / Madam

RE: OFFER OF ASSISTANCE IN TERMS IF SECTION 150 OF THE LRA

The CCMA has been keeping abreast of developments in the dispute currently underway between *insert party name* and *insert party name*. We are aware that efforts to resolve the dispute between the parties have to date been unsuccessful.

We would like to take this opportunity to offer our assistance to both parties in terms of section 150 of the Labour Relations Act. To this end, the CCMA is ready and willing to appoint a Commissioner to attempt to resolve the dispute.

If you would like the CCMA to assist you in this regard, kindly complete the attached document and return it to the writer by fax or mail to: *insert details*. Kindly note that the CCMA may only assist parties, if all parties to the dispute consent or directed by the CCMA Director to do so.

We propose either one of the following dates and have already secured a commissioner:

Insert date. Kindly indicate your preference on the form attached.

We firmly believe that we can add value to the negotiation process and would therefore urge you to give this offer serious consideration.

We look forward to hearing from you and thank you in anticipation.

Yours faithfully

Name:

Senior Commissioner

Insert Applicable Office

TEL:

2404

CELL:

FAX:

E-MAIL:

CONSENT TO S150 INTERVENTION BY THE CCMA

TO: THE SENIOR COMMISSIONER

CCMA (INSERT OFFICE)

FROM: *PARTY*

PARTY

(Please tick whichever is applicable)

DATE: *INSERT*

OR

INSERT

(Please tick one of the following)

This serves to confirm that we **consent** to the CCMA appointing a Commissioner in terms of section 150 of the Labour Relations Act to assist in attempting to resolve the dispute through conciliation.

This serves to confirm that we **do not consent** to the CCMA appointing a Commissioner in terms of section 150 of the Labour Relations Act to assist in attempting to resolve the dispute through conciliation.

Signed at _____ on this _____ day of
_____201

NAME: _____

DESIGNATION: _____

Please return by fax to *relevant staff member* on: *insert mail to fax*

Chapter 25 : Record of proceedings

Contents

- 25.1 Recording of proceedings before the CCMA
- 25.2 Notes of the arbitration
- 25.3 Record of any sworn testimony before the CCMA
- 25.4 Record of any ruling or arbitration before the CCMA
- 25.5 Rights of any party to the dispute
- 25.6 Reconstruction of the record

25.1 Recordings of proceedings before the CCMA

- 25.1.1 The CCMA is required¹ to keep a record of-
 - any evidence given in an arbitration hearing;
 - any sworn testimony given in any proceedings before the CCMA; and
 - any arbitration award or ruling made by a commissioner.
- 25.1.2 The record may be kept in legible hand-written notes or by means of an electronic recording but it is only in exceptional cases that an electronic recording may not be made.
- 25.1.3 The duty to keep a record lies with the arbitrator appointed to arbitrate a particular dispute.

25.2 Notes of the arbitration

- 25.2.1 An arbitrator must take notes of what takes place in the arbitration as well as the evidence given. It is not necessary for the notes of the evidence to be a verbatim, word-for-word record but it must be a correct summary.
- 25.2.2 The notes must be paginated and should also reflect matters such as-

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¹ *Ndlovu v CCMA Commissioner Mullins* [1999] 3 BLLR 231 (LC) and CCMA Rule 36.

- The date, time, place and case number;
- The names of the parties and their representatives;
- The issues in dispute;
- The name of each witness.

25.2.3 If notes are taken in handwriting, the arbitrator should ensure that these notes are legible. Notes may be taken on an arbitrator's portable personal computer. The arbitrator must ensure that the notes are saved and a backup is made. A copy should be printed and placed in the file.

25.3 Record of any sworn testimony and argument in any proceedings before the CCMA²

25.3.1 Evidence and argument in any proceedings including arbitration and condonation or rescission applications should be recorded and notes kept.

25.3.2 Save in exceptional circumstances the digital recorders allocated to commissioners should be used.

25.3.3 At the commencement of the recording the commissioner should ensure that the recorder is switched on.

25.3.4 At the commencement of the recording the commissioner must state the case number, the date of the hearing, the name of the commissioner and the names of the parties and their representatives.

25.3.5 If the recording is stopped during the proceedings and re-commenced the recorder creates a new file and for this reason the commissioner must ensure that the case number and the date are recorded again.

25.3.6 Commissioners must at all times ensure that there is sufficient recording time and for this reason should ensure that recordings are downloaded on a daily basis.

25.4 Record of any arbitration award or ruling made by a commissioner

25.4.1 The CCMA is obliged to keep a record of any arbitration award or ruling by a commissioner.

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² For more details see SOP 1/2011 i.e. the standing operating procedures relating to recordings.

25.5 Rights of parties to the dispute

- 25.5.1 A party may request a copy of the recording or a portion of a recording in order to cause a transcript to be made at his/her/its own cost.
- 25.5.2 The request for a copy of the recording must be made by the party, a representative of a party or by the transcriber and must be in writing and, where applicable, accompanied by documentary proof that the fee for the disk was paid in at the finance section.
- 25.5.3 The person requesting the copy of the recording should provide the designated CMO with a memory stick or a disk. If they are unable to do so, the CCMA will provide the disk on proof that the prescribed fee was paid in at the finance section.
- 25.5.4 The CMO thereafter downloads a copy of the recording on the memory stick or disk and hands the disk to the person who made the request.
- 25.5.5 In review proceedings the applicant must provide the review administrator with a copy of the transcript so that the record of the proceedings including the documentary exhibits may be prepared and certified as correct.
- 25.5.6 The transcript of a record certified as correct is presumed to be correct, unless the Labour Court decides otherwise.

25.6 Reconstructing a record of what transpired

- 25.6.1 In terms of Labour Court rule 7A, an applicant for review must in the notice of motion call upon the person or body, whose decision or proceedings are under review, to deliver to the registrar “the record of the proceedings sought to be corrected or set aside together with such reasons.” The rule further obliges the applicant to “make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct”. Copies are distributed to the parties and to the registrar. An applicant then has an opportunity to amend, add to or vary the notice of motion and to supplement the supporting affidavit.
- 25.6.2 The record of an arbitration is the tape recording or recording by other mechanical means³ or the digital recording used by the

³ *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 931 (LAC).

commissioner. Where such record is missing or incomplete it must be reconstructed.

25.6.3 The reconstruction of the record may be initiated by the applicant for review, the CCMA, any other party entitled to a copy of the record, or in terms of an order by the Labour or any other Court to do so.

25.6.4 If the record must be reconstructed, the Registrar of the region shall –

- in writing, invite the representatives of the parties or if they or any of them are not represented, the parties themselves and liaise with the presiding commissioner to determine a date on which the reconstruction can be conducted, bearing in mind any time frame which the Court might have fixed;
- notify the parties and the presiding commissioner in writing of the date and time on which, and the place where the reconstruction will be conducted and invite the parties to bring with them their notes of the proceedings and any other documentation which are relevant or assist to reconstruct the record; and
- inform the parties in writing that if they or any of them fail to attend, the reconstruction may be conducted in such party's absence.

25.6.5 The presiding commissioner –

- is obliged to attend the reconstruction proceedings and to bring his or her notes and other relevant documentation in his or her possession;
- shall chair and digitally record the reconstruction proceedings, including any agreements reached during the proceedings;
- may conduct the proceedings in any manner which he or she deems appropriate, provided that both parties are given ample opportunity to make representations based on their notes, documentation in their possession and recollection;
- must reconstruct the record as fully and accurately as the circumstances allow;
- must allow the parties an opportunity to express any reservations that they may have about the accuracy of the reconstructed record and record such reservations.⁴

25.6.6 If the reconstruction proceedings are for any reason not digitally recorded, the presiding commissioner shall –

⁴ See the *Lifecare* case and SOP 1/2011

- keep accurate hand written notes of the reconstruction proceedings,
- at the end of the proceedings read out his notes to the parties and invite them to confirm the correctness of the notes by appending their signatures to the notes (if the notes were recorded on a computer, a copy must be printed and signed). If the parties or any of them are not prepared to confirm the correctness of his notes, the presiding commissioner must record the comment of any such party;
- type out any hand written notes;
- certify that the notes are a true reflection of the reconstruction proceedings; and
- sign the typed or printed copy, as the case may be.

25.6.7 If the reconstruction proceedings were digitally recorded, the CCMA will transcribe the record.

25.6.8 The CCMA will file the reconstructed record with the Labour Court without any delay and inform the parties accordingly.

25.6.9 If both parties failed to attend the scheduled reconstruction proceedings, the commissioner shall reconstruct the record to the best of his or her ability and submit a typed copy thereof together with a certificate to that effect to the CCMA. The CCMA will file the reconstructed record with the Labour Court, if applicable, and inform the parties accordingly.

Chapter 26 – Demarcations

Contents

- 26.1 What is a demarcation dispute?
- 26.2 Who can refer a demarcation dispute?
- 26.3 Who must refer a demarcation dispute?
- 26.4 How should a demarcation dispute be referred to the CCMA?
- 26.5 What information must be in the application LRA Form 3.23?
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- 26.7 What must be done with the application form or referral by the court, arbitrator or commissioner?
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- 26.13 How to conduct a demarcation hearing.
- 26.14 What approach should be adopted when determining a demarcation dispute?

26.1 What is a demarcation dispute?

- 26.1.1 It is a dispute as to -
 - whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area; or
 - whether any provision in any arbitration award or collective agreement is or was binding on any employee, employer, class of employees or class of employers.¹
- 26.1.2 “Sector” means, subject to section 37 of the LRA, an industry or service.²

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¹ Section 62(1) of the LRA.

26.1.3 “Area” includes any number of areas, whether or not contiguous.³

26.2 Who can refer a demarcation dispute?

26.2.1 Any registered trade union, employer, employee, registered employers’ organisation or council that has a direct or indirect interest in the demarcation may apply to the CCMA. This means that an individual employee or an individual employer may also apply to the CCMA⁴. A trade union, employer, employee, employers’ organisation or council may apply to the CCMA for demarcation, if there is a dispute as to whether such union, employee, employer, employers’ organisation or council is employed or engaged, as the case may be, in a particular sector or area (and the question has not been previously determined or is not subject to a settlement agreement in terms of section 62(2) of the LRA).

26.2.2 A trade union, employer, employee, employers’ organisation or council may also apply if there is a need to change the demarcation, which regulates its position within a particular sector or area.

26.3 Who must refer a demarcation dispute?

26.3.1 If in any proceedings before the Labour Court, an arbitrator or a commissioner of the CCMA, the question is raised as to whether any employee, employer, class of employees or class of employers is or was employed or engaged in any sector or area, the Labour Court, arbitrator or commissioner, as the case may be, must adjourn the proceedings and refer the question to the CCMA for determination if -

- the question has not been previously determined; and
- is not subject to a settlement agreement in terms of section 62 (2) of the LRA.⁵

This means that the Labour Court or an arbitrator (other than a commissioner of the CCMA appointed by the Director to hear the demarcation dispute), has no jurisdiction to deal with a demarcation dispute.

26.3.2 A commissioner of the CCMA may also not deal with a demarcation dispute unless appointed to do so by the Director of the CCMA. The Director may also appoint another commissioner to deal with the demarcation dispute.⁶

² Section 213 of the LRA.

³ Section 213 of the LRA.

⁴ Section 62(1)

⁵ Section 62(3), (3A) and (5) of the LRA.

⁶ Section 62 (5) read with section 62(6) of the LRA.

- 26.3.3 Where the Labour Court or an arbitrator refers a demarcation dispute to the CCMA the Director or her delegate, the NSC: Legal Services, must appoint a commissioner to deal with the dispute.⁷

26.4 How should a demarcation dispute be referred to the CCMA?

- 26.4.1 An applicant party must complete and sign the prescribed application form (LRA Form 3.23).
- 26.4.2 The completed application, LRA Form 3.23, must be served, in accordance with Rule 5, on all other parties to the dispute.
- 26.4.3 The applicant party must file the completed application, LRA Form 3.23, with the CCMA as required by Rule 7, together with proof of service of the application on all other parties to the dispute.
- 26.4.4 A referral by the Labour Court, an arbitrator or a commissioner will be in the form of an order or ruling.

26.5 What information must be in the application, LRA Form 3.23?

- 26.5.1 All parts of LRA Form 3.23 must be fully completed and the applicant party must sign the form.
- 26.5.2 All parties that may have an interest in the dispute must be cited in the application form.
- 26.5.3 For the purposes of an application for demarcation, a party will have an interest in the dispute, if such a party will be or may be affected by the outcome of the demarcation proceedings. In the majority of demarcation matters it would be the different bargaining councils, the employers and the unions in the sector or area, which form the subject of the demarcation dispute. It may also be labour brokers who operate in the sector or area, which form the subject of the dispute.

26.6 Is there a time frame for the filing of a demarcation dispute?

- 26.6.1 There is no time frame for the filing of a demarcation application. Hence, condonation is not necessary.

26.7 What must be done with the application form or referral by the Court, arbitrator or commissioner?

- 26.7.1 Immediately upon receipt of the Form LRA 3.23 or the referral by the Labour Court, the arbitrator or commissioner, as the case may be, a case number must be allocated to the application and a case file must

⁷ Section 62 (4) of the LRA.

be opened. Thereafter the application must be captured on the system in the normal way.

26.7.2 After the process in paragraph 26.7.1 has been completed, the file must be handed to the CSC of the region or the person delegated by him or her to administer demarcation disputes.

26.7.3 The CSC or the person delegated by him or her must immediately inform the NSC:Legal-Services of the dispute by sending an e-mail setting out the details of the parties and a brief summary of the dispute. The NSC:LegalServices may request further information if necessary.

26.7.4 The NSC: Legal Services will then appoint a commissioner to hear the dispute whereafter the matter must be set down for hearing in the region unless otherwise directed by the NSC: Legal-Services.

26.8 How should the dispute be set down?

26.8.1 There is no conciliation process in demarcation proceedings. Hence, a certificate of non-resolution is not required.

26.8.2 Unless otherwise directed by the NSC: Legal Services, the matter must first be set down for *in limine* proceedings with at least 14 days notice to all parties unless the parties agree to a shorter period.

26.8.3 After all *in limine* proceedings have been completed, the matter must be set down for hearing with at least 21 days notice, unless the parties agree to a shorter period.

26.9 What must happen at *in limine* proceedings?

26.9.1 The presiding commissioner must determine –

- whether all parties cited are present and, if not;
- whether proper notice has been given to all of them;
- whether the particulars of the parties cited are correct;
- any jurisdictional problems that may exist;
- whether the dispute has not been previously determined;
- whether the dispute is not subject to a settlement agreement in terms of section 62 (2) of the LRA;
- whether the relief sought can be awarded under section 62 of the LRA;

- whether all parties that have or may have an interest in the outcome of the demarcation proceedings have been cited and give directives as to possible joinder of any other party to the proceedings or join such other party or parties on his/her own accord, as provided for in Rule 26;
- any other *in limine* issues that should or can be determined before the final demarcation hearing can proceed and make the necessary rulings (after hearing all parties present);
- whether a pre-hearing conference should be held between the parties or to attempt to get the parties to reach consensus on the issues contemplated in Rule 20, insofar as they may be relevant for the determination of the demarcation dispute;
- whether publication contemplated in section 62 (7) of the LRA is necessary and identify parties (other than those that have been or will be joined) that may possibly be affected or may possibly have an interest in the outcome of the dispute, such as, municipalities or
- whether the final determination can be made on the papers filed and the written submissions by the parties, without a further hearing; and
- whether statements of case should be filed by the parties.

26.9.2 All rulings made at the *in limine* proceedings or thereafter must be reduced to writing and submitted to the regional office. The regional office must submit it to the office of the NSC: Legal Services for perusal. If approved by the office of the NSC: Legal Services, the ruling may be served on all parties.

26.9.3 The presiding commissioner must submit a report on the *in limine* proceedings together with any directives, if applicable, to the regional office of the CCMA within 2 days of the conclusion of the proceedings.

26.9.4 A copy of the report must be forwarded to NSC: Legal-Services, for record purposes.

26.10 When must a notice contemplated in section 62 (7) of the LRA be published?

26.10.1 A notice must be published if the CCMA, (in practice the presiding commissioner, after engaging the parties present), believes that the question raised is of substantial importance. In essence it means that a notice inviting representations should be published where the outcome of the demarcation proceedings may have a serious effect (direct or indirect) on a substantial part of an industry or sector or

more than one industry or sector, or class of employers or employees.

26.10.2 It may also be advisable to publish where there is reason to believe that the outcome of the proceedings may affect sectors, areas, industries, enterprises or institutions which are not party to the dispute or which cannot readily be identified and joined.

26.10.3 The NSC: Legal-Services must be consulted in this regard.

26.10.4 The notice must be published before the final hearing. The hearing may not commence until the period stated in the notice has expired.⁸

26.11 What information must be in the notice?

26.11.1 The notice must state the following -

- the case number allocated to the application;
- the particulars of the parties;
- the nature of the demarcation/relief sought;
- if applicable, sectors, areas, industries, enterprises or institutions which may possibly be affected or may possibly have an interest in the outcome of the dispute and which have not been or will not be joined;
- an invitation to make representations;
- an address to which the representations must be directed; and
- a period within which representations may be submitted.⁹

26.12 What must be done to effect publication of a notice?

26.12.1 If it is decided that a notice must be published, NSC: Legal Services must be informed, together with brief reasons, why publication is necessary (which should not be in the form of a ruling). This may be done by email.

26.12.2 All information that should be in the notice must accompany the request for publication.

26.12.3 The NSC:Legal Services will delegate a staff member to effect the publication and provide the commissioner with the number of the notice and of the *Government Gazette* in which the notice has been

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⁸ Section 62 (8) of the LRA.

⁹ Section 62 (7) of the LRA.

published and a copy of the notice. (Section 62 (7) does not require publication in the newspaper.)

26.12.4 A copy of the notice must be placed on the case file.

26.13 How to conduct a demarcation hearing

26.13.1 The provisions of section 138 of the LRA, read with the changes required by the context, are applicable.¹⁰ This means that a commissioner hearing a demarcation application has all the powers and duties set out in section 138 of the LRA in so far as they may be relevant in the context. Therefore, the guidelines set out in Chapters 12, 13 and 14 of this Manual are equally applicable to demarcation proceedings.

26.13.2 There is no statutory onus on any of the parties in demarcation proceedings. Hence, it is suggested that the general rule, “he who alleges must prove”, applies, unless there are compelling reasons to direct otherwise. In demarcation proceedings, the applicant party alleges that it is employed or engaged in a particular sector or area. Therefore, if the general rule applies, it is the applicant party that bears the onus to prove the allegations relied upon to substantiate its claim.

26.13.3 Because the applicant bears the onus, the applicant must also begin, unless otherwise directed by the presiding commissioner.

26.13.4 The presiding commissioner must also consider any written representations received in response to the notice published in the *Government Gazette* and consult *NEDLAC*.¹¹ (*NEDLAC* will be consulted by the office of the NSC: Legal Services after a draft award has been received).

26.13.5 Any presentations received in response to the notice must be made available to the parties to the proceedings and the parties should be given an opportunity to respond to them before they are relied upon to make a determination.

26.13.6 The presiding commissioner must submit a draft award, together with brief reasons, to the regional office of the CCMAt within 10 days of the conclusion of the proceedings.

26.13.7 The draft award must be captured on the system, whereafter the draft award, together with brief reasons, must be sent to the NSC: Legal Services.¹²

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¹⁰ Section 62 (4) and (6) of the LRA.

¹¹ Section 62 (9) of the LRA.

¹² Section 62 (10) of the LRA.

26.13.8 The office of the NSC: Legal Services will peruse the award, consult *NEDLAC* and revert to the commissioner. The commissioner must consider any submissions made by *NEDLAC*. The commissioner is not bound by them, but depending on the nature of *NEDLAC*'s submissions, it may be necessary for the commissioner to supplement the draft award to deal with them.

26.13.9 The final award must be sent to the office of NSC: Legal Services for final perusal before it is served on the parties.

26.13.10 A copy of the signed award, together with proof of service of the award, must be sent to NSC: Legal Services for record purposes.

26.14 What approach should be adopted when determining a demarcation dispute?

26.14.1 There are no hard and fast rules to determine a demarcation dispute, but as a point of departure it should be borne in mind that the purpose of bargaining councils is to create a forum for organised labour and employers in a defined sector to regulate affairs in that sector and the relevance of demarcation is to avoid overlap and fragmentation.¹³ (The scope of a bargaining council in a particular sector is determined with reference to the certificate of registration.)

26.14.2 The following approaches have been adopted by the courts:

- The meaning and ambit of the industry as defined in the registered scope of the council should be determined.
- The activities of the employer should be determined.
- The activities and the definition should be compared to determine whether the activities fall within the definition.¹⁴
- The character of an industry (or sector) is not determined by the occupation of the employees in the employer's business, but by the nature of the enterprise in which the employer is engaged.

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¹³ See also *Labour Relations Law – A Comprehensive Guide*, 5th Ed by Du Toit at p 30.

¹⁴ (See *Greatex Knitwear (Pty) v Viljoen and others NNO 1960 (3) SA 338 (T)* quoted with approval in *Coin Security (Pty) Ltd v CCMA and others [2005] 7 BLLR 672 (LC)* and *Richards Rentals (Pty) Ltd and the National bargaining Council for the Road Freight Industry (2009) 30 ILJ 229 (CCMA)*)

Once the character of the industry is determined, all employees are deemed to be engaged in that industry.¹⁵

- Where the vast majority of the employees are engaged in a particular industry, the enterprise as a whole and all its employees may be deemed to be engaged in that industry, i.e. the occupation of the vast majority of employees may determine the character of the industry.¹⁶
- The main or core activities of the employer are not always determinative, because it is possible for an employer to conduct two or more industries at the same time and to be an employer in more than one industry. The one may be ancillary to the other or they may be distinct. The test in such circumstances is the degree. Hence, the dimension of the activities which form the subject of the application for demarcation must then be looked at. The question is whether the activities were of sufficient dimensions to justify the conclusion that the employer carries on and is associated with its employees in more than one industry.¹⁷

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¹⁵ See *Coin Security (Pty) Ltd v CCMA & others* [2005] 7 BLLR 672 (LC) at paras 54 – 55 and *Ko-operatiewe Wynbouersvereniging van Zuid Afrika Beperk v Industrial Council for the Building Industry & others* 1949 (2) SA 600 (AD) at p 608.

¹⁶ See *CWIU & others v Smith & Nephew Limited* [1997] 9 BLLR 1240 (CCMA).

¹⁷ See *Ko-operatiewe Wynbouersvereniging (supra)*, *Attorney General, Transvaal v Moores (SA) (Pty) Ltd* 1957 (1) SA 190 (AD) at 197 and *S v Morningside Nursing Home (Pty) Ltd* (1999) 10 ILJ 1150 (IC) where the Court looked at the magnitude of the work undertaken, the probable costs and the period of time over which the work was performed and decided that Morningside was engaged in activities separate from its normal activities and therefore also engaged in the Building Industry.

Chapter 27: Picketing

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- 27.1 Introduction
- 27.2 The provisions of the LRA
- 27.3 The purpose of picketing
- 27.4 The nature of the proceedings
- 27.5 Testing the reasonableness of the employer's refusal
- 27.6 Fair procedure
- 27.7 Stage 1
- 27.8 Stage 2
- 27.9 Variation or amendment of picketing rules

27.1 Introduction

- 27.1.1 Section 69 of the Labour Relations Act provides that parties needing picketing rules may approach the CCMA to attempt to agree picketing rules. If the parties do not agree on the rules, the CCMA must establish or set picketing rules. The Code of Good Practice for Picketing established by NEDLAC, must be taken into account when establishing picketing rules. Until recently, there were few judgments regarding picketing rules and none regarding the process of establishing them. It is essential that a fair procedure is followed.

27.2 The provisions of the LRA

- 27.2.1 Section 69 of the LRA provides that a registered trade union may authorize a picket by its members and supporters for the purpose of peacefully demonstrating in support of any protected strike or in opposition to any lock-out.
- 27.2.2 A picket may be held -
 - in any place to which the public has access but outside the premises of an employer;
 - in a place which is owned or controlled by a person other than the employer, if that person has had an opportunity to make representations to the CCMA before the rules are established; or

- with the permission of the employer, inside the employer's premises. The permission may not be unreasonably withheld.

27.2.3 If requested, the CCMA "must attempt to secure agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out". If there is no agreement, the CCMA must establish picketing rules, and in doing so must take account of -

- the particular circumstances of the workplace or other premises where it is intended that the right to picket be exercised; and
- any relevant code of good practice.¹

27.2.4 The rules established by the CCMA may provide for picketing by the employees on their employer's premises if the CCMA is satisfied that the employer's permission has been unreasonably withheld.

27.2.5 A breach of picketing rules may be referred to the CCMA for conciliation, and if unresolved, to the Labour Court for adjudication.

27.3 The purpose of picketing

27.3.1 The Labour Court has held that employees may, among other things, display placards communicating to their employer and the public; speak to replacement labour with a view to persuading them not to work; speak to members of the public and customers etc and ask them to boycott the employer as a show of support; sing, chant and dance to draw the public's attention to their strike². Clearly, by outlining these and other permissible activities, the court viewed the primary purpose of picketing as a way of communicating the issues in dispute in order to gain public support for the strike. This is in line with item 3 (1) of the Code of Good Practice on Picketing.

27.3.2 The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage employees not to work during the strike or lock-out. It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.

27.4 The nature of the proceedings

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¹ Commissioners are also encouraged to have regard to International Law. See *Shaprte Checkers (Pty) Ltd v CCMA & others* [2007] 5 BLLR 473 (LC) at 478

² *Picardi Hotels Ltd v FGWU & others* [1999] 6 BLLR 601 (LC)

27.4.1 The establishment of picketing rules is a *sui generis* or unique process and not a conciliation or arbitration. In particular, the submissions made in conciliation are not “without prejudice” and they are taken into account when establishing the rules.

27.4.2 The Labour Court³ has held that -

- The commissioner must determine the reasonableness of the employer’s refusal (to allow picketing on the premises) as a jurisdictional prerequisite;
- The commissioner must follow a fair procedure in establishing the rules;
- Reasons for the rules must be provided (in the rules or an attachment thereto).
 1. Commissioners are also encouraged to have regard to International law-see Shoprite Checkers Pty Ltd v CCMA & others [2007] 5 BLLR 473 (LC) at 478
 2. Picardi Hotels Ltd v FGWU & others [1999] 6 BLLR 601 (LC)
 3. See case in footnote 1.

27.5 Testing the reasonableness of the employer’s refusal

27.5.1 When testing the reasonableness of an employer’s refusal, the commissioner must first determine whether the employer’s refusal was unreasonable, and then decide on the appropriate number of picketers.

27.5.2 The general rule is that picketing is not allowed on an employer’s premises and therefore the union bears the onus of proving that the refusal was unreasonable. Determining the reasonableness of the employer’s refusal is a jurisdictional pre-requisite, and an objective test must be used. The Sidumo⁴ test applies to the commissioner’s decision, in other words, the decision must be that of a reasonable decision-maker.

27.6 Fair procedure

27.6.1 There should be a seamless two-stage process -

Stage 1 – Consensus-seeking (not conciliation)

Stage 2 – Establishing the rules (not arbitration)

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³ *Shoprite Checkers (Pty) Ltd v CCMA & others* [2007] 5 BLLR 473 (LC)

⁴ *Sidumo and another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC)

27.6.2 Prior to the hearing, the CCMA should circulate draft rules to the parties. These may then form a basis for identifying which rules are agreed, and which, if any, need determination.

27.7 Stage 1

27.7.1 During this stage the commissioner should -

- Utilise conciliation steps and techniques, in particular mediation;
- Utilise joint problem solving techniques;
- Utilise facilitation techniques;
- Draw on existing examples of picketing rules to attempt to get agreement on the rules.

27.7.2 As there is now authority that the process is *sui generis*, legal representation would be permissible even in Stage 1. (The CCMA Rules limit or exclude legal representation only for conciliation and arbitration of certain dismissal disputes, and such exclusion would need to be interpreted narrowly.)

27.8 Stage 2

27.8.1 The fact-bound common cause information obtained in the first stage should inform decision-making during the establishment of the rules.

27.8.2 During this stage the commissioner should –

- Record the proceedings;
- With all parties present, identify common cause issues / rules that are acceptable to both parties;
- Identify issues on which the parties are in dispute. These will need to be determined;
- Place on record the information that was disclosed during the first stage that will be used to make the decision. Parties must have an opportunity to withdraw or comment on such information;
- Give parties an opportunity to present evidence on disputed facts;
- Allow cross-examination of evidence, and re-examination;
- Give the parties an opportunity to make closing arguments;
- Adjourn and take evidence and submissions into account;

- Consider the factors in item 5 of the Code of Good Practice on Picketing;
- Draft proposed rules;
- Give the parties an opportunity to make submissions on the proposed rules. This step is in order to test the proposed rules with the parties before they are established, as a means to ensure that the rules are clear, precise and workable. This may be done in writing and it should not be necessary to reconvene for this step;
- Revise and/or supplement the picketing rules;
- Establish the rules; and
- Give written reasons for the rules and attach these to the rules.

27.9 Variation or amendment of picketing rules

- 27.9.1 A party must be able to demonstrate changed circumstances to persuade the CCMA to amend its picketing rules. The changed circumstances would have to be material.
- 27.9.2 In terms of the LRAA of 2014, in particular section 69 (12), the Labour Court may be approached to order compliance with picketing rules. This order may also be made binding on a person who owns or is in control of premises.
- 27.9.3 In terms of the LRAA of 2014 the Labour Court may also vary the terms of the picketing rules and may only grant such an order on proper notice of such application, unless a shorter period is permitted with reference to section 69(14).

Chapter 28 - Diplomatic and Consular Missions, International Agencies and their Representatives

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- 28.1 Immunity of foreign states and international organisations
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- 28.3 The agreed procedure for dealing with mission/ international agency cases
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- 28.6 Relevant Conventions / legislation

28.1 Immunity of foreign states and international organisations

- 28.1.1 In terms of various Vienna Conventions and United Nations Conventions, which have been incorporated into South African domestic law by virtue of the provisions of Section 2 (1) of the Diplomatic Immunities and Privileges Act, 2001 (No 37 of 2001) and the Foreign States Immunities Act 1981 (Act 87 of 1981), missions and diplomatic representatives enjoy immunity and inviolability. A "mission" is any accredited diplomatic mission, consular post or international organisation in South Africa.
- 28.1.2 However, diplomatic missions, consular posts, international organisations and persons conferred with immunity have to respect the laws and regulations of the RSA as host state provided for in the Vienna and United Nations Conventions regulating privileges and immunities.

28.2 The concepts: diplomatic immunity, functional immunity and inviolability

- 28.2.1 It is extremely difficult to differentiate between persons conferred with full immunity and those with functional immunity.
- 28.2.2 A foreign state or the accredited international organisation enjoys sovereign immunity as far as acts of state are concerned, i.e. if liability is incurred in respect of such acts the foreign state cannot be summoned before a South African court. In certain circumstances certain commercial acts do not entitle the sending state to immunity within the territory of the Republic.
- 28.2.3 Section 5 of the Foreign State Immunities Act, Act No 87 of 1981, deals with the circumstances under which a foreign state shall not be

immune in respect of contracts of employment and sets the following prerequisites-

- The contract must have been concluded in the Republic or the work had to be performed wholly or partly in the Republic; and
- At the time when the contract was concluded, the employee must have been a South African citizen or must have been ordinarily resident in the Republic; and
- At the time when the proceedings are brought, the employee must not be a citizen of the foreign state; and
- There must be no written agreement that the dispute or any dispute relating to the contract shall be justiciable by the courts of a foreign state; and
- The proceedings must not relate to the employment of the head of the diplomatic mission or any member of the diplomatic mission or any member of the diplomatic, administrative, and technical or service staff of the mission or to the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post.

28.2.4 Diplomatic representatives enjoy full immunity and inviolability (meaning “set apart” or “untouchable”) as far as acts of state are concerned with the result that no process documents, such as our referral forms or notices to attend hearings may be served on such representatives.

28.2.5 On the other hand, consular representatives enjoy immunity only in respect of acts performed in the exercise of their consular functions (“functional immunity”). In such cases, the consular official could be served documents for a domestic dispute.

28.2.6 From our referral forms, it is not easy to see the difference, and it is therefore better to deal with all embassy / international agency cases as if full immunity applies.

28.3 The agreed procedure for dealing with mission / international agency cases

28.3.1 Section 13 (1) of the Foreign States Immunities Act, Act No 87 of 1981 provides as follows-

“Any process or other document required to be served for instituting proceedings against a foreign state shall be served by being transmitted through the Department of Foreign Affairs and Information of the Republic to the ministry of foreign affairs of the foreign state, and service shall be deemed to have been effected when the process or other document is received at that ministry”.

- 28.3.2 Because of the difficulty in distinguishing between different types of immunity and inviolability, the Department of Foreign Affairs: State Protocol (DFA) and CCMA have agreed a process for dealing with all cases involving diplomatic missions, consular posts and offices of international organisations.

Step 1: The applicant refers the dispute directly to the CCMA using the LRA Form 7.11 without having to provide proof of service on the employer. If the applicant comes to the CCMA in person, the CMO should advise the applicant not to send the form to the employer. If the employee has already sent the referral form by fax or registered post, the mission will simply ignore the “service”.

Step 2: The CMO asks the applicant to write a “statement of case” setting out the facts (what happened); why the applicant believes the employer’s conduct was unfair and the desired result.

Step 3: The CCMA creates a case (leaving out cell numbers for the employer as an SMS to attend a hearing is considered a serious affront). If the receiving CCMA office is out of Tshwane, the case must be transferred to CCMA Tshwane office. Tshwane office refers the matter to the DFA – a copy of the referral form and the statement of case. The DFA serves the form on the mission following the appropriate protocol.

Step 4: The Director for Immunities and Privileges calls in the Deputy Head of the relevant mission or international organisation and presents a diplomatic note containing the referral form and statement of case. In the diplomatic note, the DFA encourages resolution of the dispute in compliance with South African laws. If there is no response the matter is escalated to the Chief of State Protocol when a second diplomatic note is handed personally to the Head of Mission / International Organisation.

Step 5: The CCMA receives a written response from the Mission / International Organisation and the CCMA serves this on the applicant.

Step 6: If the applicant wishes to pursue the dispute further, the CCMA will arrange advisory arbitration (as part of conciliation) where the advisory award will be made on the basis of the papers received from both sides.

Step 7: The Tshwane office forwards the advisory award to the applicant and the DFA. The DFA will serve the advisory award on the mission / organisation with a diplomatic note encouraging compliance with the advisory award.

Step 8: If the dispute remains unresolved and the applicant wishes to pursue it, a certificate will be issued and the referral steps will be followed for arbitration.

Step 9: Where it is clear that the CCMA has no jurisdiction, such a ruling can be made without the need to set the matter down. Where it is unclear whether the CCMA has jurisdiction, it will set the matter down for an arbitration hearing and notification will again be served through the DFA. The commissioner will have to decide on jurisdiction, depending on the nature of the respondent and the nature of immunity (full or functional), unless immunity is waived. The jurisdictional ruling or arbitration award is served through the DFA.

28.4 Enforcement of arbitration awards

28.4.1 Once an award is issued in terms of which a mission is required to perform a positive act (e.g. reinstatement, or payment of compensation or severance pay), the following procedure must be followed-

- The CCMA must forward a copy of the award to the DFA.
- The DFA must in turn forward a copy of the award under a diplomatic note to the mission with a request that the mission or the representative, as the case may be, should comply with the award pursuant to the relevant conventions.

28.4.2 In terms of Article 22 (3) of the Vienna Convention on Diplomatic Relations of 1961, the premises of the mission, their furnishings and other property and vehicles are immune from attachment or execution. Accordingly, as a matter of law, it is not possible to attach the assets of the mission as a means to give effect to any CCMA award. This emphasises the need for an advisory arbitration (which is part of conciliation) to resolve the dispute.

28.5 List of international agencies

Labour disputes with regard to the under-mentioned organisations should be forwarded to the Department of Foreign Affairs via CCMA Tshwane office to ensure that the referral form with the statement is properly served-

- European Union
- European Investment Bank
- Food Agricultural Natural Resources Policy Analysis Network
- International Committee of the Red Cross

- International Finance Corporation Sub-Saharan Africa Hub
- International Institute for Democracy and Electoral Assistance
- International Labour Organization
- International Monetary Fund
- International Organization for Migration
- International Federation of Red Cross and Red Crescent Societies
- International Union for the Conservation of Nature and Natural Resources
- International Water Management Institute
- Multilateral Investment Guarantee Agency
- Orange Senqu River Commission
- Pan African Parliament
- The Regional Tourism Organization of Southern Africa
- United Nations Food and Agriculture Organization
- United Nations High Commissioner for Refugees
- United Nations International Children's Emergency Fund
- United Nations Development Programme
- United Nations Industrial Development Organization
- United Nations Information Centre
- United Nations Office for the Co-ordination of Humanitarian Affairs
- United Nations Office on Drugs and Crime
- United Nations Populations Fund
- United Nations World Food Programme
- World Bank

- World Health Organization

All High Commissions and Embassies as well as any of their offices, e.g. UK Trade and Investment, which is part of the British High Commission. It enjoys full immunity.

28.6 Relevant conventions / legislation

Diplomatic Immunities and Privileges Act 37 of 2001

Foreign States Immunities Act 87 of 1981

Vienna Convention on Diplomatic Relations, 1961

Vienna Convention on Consular Relations, 1963

Convention on the Privileges and Immunities of the United Nations, 1946

Convention on the Privileges and Immunities of the Specialized Agencies, 1947

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