PRACTICE AND PROCEDURE MANUAL

5th Edition

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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 CCMA staff in the performance of their functions; and
- to promote consistency in the performance of the CCMA functions.

1.3 The following features of the manual will assist users in finding relevant topics:

- The contents 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

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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;
2.1.2 arbitrate a dispute that remains unresolved after conciliation, if it has the powers to do so;
2.1.3 perform any other duties imposed on it by or in terms of the LRA; and
2.1.4 compile and publish information and statistics about its activities.

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 offer to resolve a dispute that has not been referred to it through conciliation;
2.2.4 make rules regulating the matters referred to in sections 115 (2) (cA) and 115 (2A) of the LRA;
2.2.5 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;
2.2.6 publish guidelines in relation to any matter dealt with in the LRA;
2.2.7 conduct and publish research into matters relevant to its function; and
2.2.8 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.

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 statutory 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 the CCMA may conciliate and arbitrate, the geographical area in respect of which the CCMA 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.

2.3.3 Exclusive jurisdiction to enforce certain LRA rights has been assigned to the CCMA. At arbitration the CCMA has the power to uphold or to dismiss a claim provided it has the power or competence to do so. If the CCMA does not have the power or competence to entertain (consider) the claim, it neither has the power to uphold the claim nor the power to dismiss the claim (other than to dismiss the claim for want of jurisdiction). The claim must be one that is capable of being pursued before and ruled upon by a CCMA arbitrator. When a claimant alleges that the claim is to enforce a right

created by the LRA, then that is the claim that the CCMA has before it, as a fact. If the LRA authorises the CCMA to consider and to rule upon such claim then the CCMA has jurisdiction. The claimant must prove what is alleged in this regard in order to obtain relief.[2]

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,exploration or production vessels.It does not extend to embassies, however, because of the provisions of the Foreign States Immunities Act, No 87 of 1991.[3]

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.[4]

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 province in which the cause of action arose, unless a senior commissioner in the head office of the CCMA directs otherwise.[5]

2.4.4 If there are reasons why a dispute should be arbitrated in a province other than the province where the dispute arose, an application should be made for the dispute to be conciliated or arbitrated in a different province. Unless it was authorised by a senior commissioner in the head office of the CCMA, provincial offices of the CCMA do not have jurisdiction to conciliate or arbitrate disputes that arose in other provinces.

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). Two notable exceptions are disputes relating to freedom of association and disputes regarding discrimination where persons seeking employment or applicants for employment may also be parties to disputes.[6]

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."[7]

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 it is illegal to employ them. [8]

2.5.4 In terms of the Constitution, like is 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.[9]

2.5.5 In the case of **illegal foreigners,** by criminalising only the conduct of the employer who employs a foreigner who does not have a work permit and by failing to proscribe 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 an illegal foreigner. 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.[10]

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.

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.

2.5.10 The CCMA (and not any public service bargaining council) has jurisdiction in respect of certain organs of state that are, in terms of the legislation that created them, institutions outside the public service, e.g. Universities, the HSRC, Land Bank, Reserve Bank, the CCMA, SARS and others.

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*.'[11]

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 following factors are present-

- the manner in which the person works, is subject to the control or direction of another person;
- the person's hours of work are subject to the control or direction of another person;
- in the case of a person who works for an organisation, the person forms part of that organisation;
- the person has worked for that person for an average of at least 40 hours per week over the last three months;
- that person is economically dependent on the person for whom he/she works or renders services;
- the person is provided with tools of trade or work equipment by that person; or
- the person only works for or renders services to one person.

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 listed 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 minimum annual remuneration determined by the Minister of Labour.[12] The presumption assists a party who proves one or more of the factors referred to in section 200A. Once an applicant has proved that one or more 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. [13]

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 that term in labour legislation.[14]

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

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

2.7.1 The obligatory function of the CCMA to 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 must 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 not specifically referred to in any provision of the LRA, other than section 134 (1), as disputes that may be referred for conciliation. These are disputes about matters of mutual interest referred to the CCMA by any party to the dispute provided that such parties may only be employees and/or trade unions, on the one side, and employers and/or employers' organisations on the other side. Any issue between such parties concerning employment is a matter of mutual interest and these include interest as well as rights disputes.[15]

2.7.3 The disputes that the CCMA must 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;
- 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 forum 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 section134 of the LRA;
- all unfair dismissal disputes and unfair labour practice disputes – section 191(1)(a) of the LRA;
- severance pay disputes – section 41 of the BCEA;
- disputes about payment of statutory monies – section 74 of the BCEA;
- disputes about the disclosure of information needed for consultation regarding affirmative action – section 18 of the Employment Equity Act (EEA);
- disputes about learnerships – section 19 of the Skills Development Act (SDA);
- disputes regarding the number of full-time health and safety representatives – section 26 (11) of the Mine Health and Safety Act (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, e.g., it may offer to conciliate disputes that were not referred to it, e.g. disputes that the LRA requires to be conciliated by bargaining councils.[16]

2.8 What disputes must be arbitrated by the CCMA?

2.8.1 The CCMA must arbitrate 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 to arbitration by the CCMA.[17]

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;
- 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 – section 191(12) of the LRA;
- unfair labour practice disputes – section 191(5) (a) (iv) of the LRA;

- severance pay disputes – section 41 of the Basic Conditions of Employment Act (BCEA);
- disputes regarding payment of statutory monies, if referred properly – section 74 of the BCEA;
- disputes about the disclosure of information needed for consultation regarding affirmative action – section 18 of the Employment Equity Act (EEA);
- disputes about learnerships – section 19 of the EEA;
- disputes regarding the number of full-time health and safety representatives – section 26 (11) of the Mine Health and Safety Act (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 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?

2.9.1 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, the employee may elect to refer the dispute either to the Labour Court or the CCMA.[18]

2.9.2 Such an employee has such a choice irrespective of whether the dispute also involves procedural unfairness.[19]

2.9.3 Such an employee has the choice even if no procedure was followed.[20]

2.9.4 It is debatable whether the legislator intended such an employee only have such a choice if the consultation process preceding the dismissal applied to that employee only.[21]

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 Commission and subsection 24 (3) to (5) with the necessary changes apply to that dispute.[22]

2.10.2 The settlement agreement need not be a collective agreement[23] but the following requirements have to be met-[24]

- 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;[25]
- The dispute must not relate to essential services or maintenance services; and
- The general jurisdictional requirements for arbitration must be met.

2.11 What disputes fall under the jurisdiction of bargaining 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 bargaining councils and not by the CCMA.

2.11.2 The powers and functions of bargaining councils appear from section 28 of the LRA and include the performance of the dispute resolution functions referred to in section 51.

2.11.3 In terms of section 51 (2) (a) **parties[26] to a bargaining council** must attempt to resolve any dispute between themselves in accordance with the constitution of the 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.

2.11.4 In terms of section 51(3) read with sections 51 (2) (b), 51 (4) and 52, a bargaining council further has the power and the obligation to resolve disputes referred to it by **a party who is not a party to the bargaining 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.

2.11.5 Before a bargaining council may perform a dispute resolution function in respect of disputes involving one or more parties who fall within the registered scope of the bargaining council but are not parties to the bargaining 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 bargaining 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 bargaining 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 bargaining council is accredited to resolve disputes through arbitration, the accreditation may further be limited to specified disputes.

2.11.7 As the LRA, in section 52 thereof, only requires accreditation of bargaining councils in respect of disputes involving non-parties falling within the registered scope of the bargaining council, no accreditation is needed by bargaining councils to perform a dispute resolution function in respect of disputes between parties to the bargaining 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 Commission, 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 bargaining council do not have a choice between the bargaining council and the CCMA. Subject to the exceptional circumstances referred to below, if a bargaining council has jurisdiction the matter must be referred to such bargaining 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 bargaining council and must fall only within the registered scope of that bargaining council and no other bargaining council, otherwise section 147 (4) applies and the CCMA has exclusive jurisdiction in respect of the dispute.[27]

2.11.10 In exceptional circumstances, the parties to a dispute might not know that they fall within the registered scope of a bargaining 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 bargaining 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 has 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 Act.

2.11.11 There is a distinction between the situation where a party refers a dispute to the CCMA with full knowledge that a bargaining 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 bargaining council has jurisdiction.

2.11.12 Where a party refers a dispute to the CCMA with full knowledge that a bargaining 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 bargaining 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 bargaining council with jurisdiction. If necessary, an application for condonation of a late referral will have to be made. It is however unlikely that a bargaining council will condone a late referral if the

lateness was caused by the referring party deliberately ignoring the provisions of the LRA.

2.11.13 Where the referring party was unaware that a bargaining council had jurisdiction and the CCMA or a 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-

- the CCMA or the commissioner dealing with the matter should indicate in the ruling that the discretion was exercised to refer the matter to the appropriate bargaining council for resolution;

- the parties as well as the bargaining council should be notified of the ruling; and

- a copy of the referral document and the CCMA's ruling or the commissioner's ruling should be forwarded to the bargaining council.

In such event the date of referral of the dispute to the bargaining 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 bargaining council for condonation of a late referral.

2.11.14 Generally a bargaining council would have jurisdiction to resolve disputes between parties to the bargaining 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 bargaining 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 Bargaining 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 bargaining 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)[28];
- dismissal disputes in respect of which the Labour Court would have jurisdiction to adjudicate if it remained unresolved at conciliation[29] including disputes where the reason for the dismissal is alleged to be automatically unfair or based on operational requirements or participation in an unprotected strike[30] (conciliation only);
- dismissal disputes in respect of which the Labour Court would have jurisdiction to adjudicate if it remained unresolved at conciliation but

where the parties consent to arbitration by the bargaining council (conciliation and arbitration)[31];

- dismissal disputes where an employee was dismissed by reason of operational requirements following a consultation procedure that applied to that employee only and where the employee has elected that the dispute be arbitrated[32] (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)[33];
- constructive dismissal disputes (conciliation and arbitration);
- dismissal disputes where the employee does not know the reason for the dismissal (conciliation and arbitration);
- unfair labour practice disputes (conciliation and arbitration);
- severance pay disputes[34] (conciliation and arbitration).

2.11.16 Bargaining 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 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?

2.12.1 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. If a collective agreement provides for such procedure, a party may only refer a dispute about the interpretation or application of the agreement to the CCMA if-

- the procedure provided for in the collective agreement is not operative; 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.

2.12.2 Where the procedure provided for in the collective agreement is operative and where no party has frustrated the resolution of the dispute in terms of the agreed procedure, a party to a dispute about the interpretation or application of the collective agreement does not have an option to refer the dispute to the CCMA as such party must refer the dispute for resolution in terms of the procedure provided for in the collective agreement. If a party

refers such a dispute to the CCMA with full knowledge of the agreed procedure and that the procedure is operative and that no party has frustrated the resolution of the dispute in terms of such procedure, the CCMA would not have jurisdiction to perform a dispute resolution function and a ruling should merely be made that the CCMA does not have jurisdiction.

2.12.3 It is possible that a referring party may not realise at the time of the referral that the dispute is actually about the interpretation or application of a collective agreement or that the collective agreement contains an agreement relating to private dispute resolution as envisaged in section 147 (1) (a) and 147 (6) of the LRA.In such circumstances the CCMA has a discretion to refer the dispute for resolution in terms of the procedure provided for in terms of the collective agreement or to continue with the resolution of the dispute under the auspices of the CCMA. If the first option is exercised the dispute should be referred to the appropriate person or body and a copy of the ruling must be sent to the parties as well as such person or body.

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, the CCMA 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 a 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 bargaining 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, bargaining 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 reinstatement, 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 reinstatement, re-employment or compensation.In addition a commissioner may make an award-[35]

- 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

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

[2] *Makhanya v University of Zululand* (2009) 30 ILJ 1539 (SCA); *Gcaba v Minister of Safety & Security & others* (supra) at par 75; SAMSA v Mckenzie (017/09) [2010] ZASCA 2 (15 February 2010) at para 7 to 8.

[3] See Chapter 28 below as to the procedure to be followed in the case of diplomatic and consular missions.

[4] *Astral Operations Ltd v Parry* (2008) 29 ILJ 2668 (LAC) at para 19.

[5] Rule 24.

[6] See section 5 read with section 8 of the LRA regarding freedom of association and protection of persons seeking employment and Section 6 to 10 of the EEA regarding prohibition of discrimination against applicants for employment.

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

[8] See *"Kylie" v CCMA & others* (2010) 31 *ILJ* 1600 (LAC).

[9] See *"Kylie" v CCMA & others* (supra).

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

[11] *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.

[12] Presently R149 376 per annum.

[13] Section 2 of the LRA.

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

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

[16] Section 150.

[17] Section 133 (2) and section 136(1).

[18] Section 197 (12).

[19] *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).

[20] *Rowmoor Investment (Pty) Ltd v Wilson & others* (2008) 29 ILJ 2275 (LC).

[21] See *Telesure Investment Holdings (Pty) Ltd v CCMA & others* (2008) 29 *ILJ* 2026 (LC) at 2029 in which it was found that the jurisdictional investigation that a commissioner is required to conduct *"was whether other employees were dismissed arising from the consultation during the same period."* This was followed in *Ngidi and Fidelity Supercare Group* (supra). However certain passing remarks by the LAC in *Bracks N.O. & another v Rand Water & another* let to Practice Note 3 of 2010 which stated that the CCMA has jurisdiction to arbitrate a case involving the dismissal of a single employee irrespective whether more employees were consulted during a preceding consultation process.

[22] Section 24 (8).

[23] 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. KZNRFBC 2390 and 9092).

[24] See the chapter dealing with settlement agreements for a further discussion of interpretation or application and enforcement of settlement agreements.

[25] See the chapter dealing with settlement agreements as to the meaning of "interpretation or application."

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

[27] 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.

[28] Section 51 (3) read with sections 51 (1) and 51 (2) (b).

[29] Section 191 (1) (a) read with section 191 (4).

[30] Section 187 (1).

[31] Section 51 (3) (b) (ii).

[32] Section 51 (3) read with section 191 (12).

[33] Section 191 (4) read with section 191 (5).

[34] Section 41 (6) of the BCEA read with section 41 (8) and (9).

[35] Section 138 (9) and (10).

Chapter 3 : Notice and Service

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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 CCMA to ensure that service was properly effected.

3.3.2 A party may serve a document on the other parties by **handing a copy** of the document to[2]-

- the person concerned;
- 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 at[3]-

- 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 **faxing or telexing** a copy of the document to the person's fax or telex number respectively, or a number chosen by that person to receive service.[4]

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 service[5].

3.3.6 A document may also be served[6] -

- 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 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 to[7]-

- 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 Commission or a commissioner may order service in a manner other than prescribed in rule 5.[8]

3.4 How can a party prove that a document was served?[9]

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

- 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 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.

3.4.4 The Commission 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 Commission?[10]

3.5.1 Documents must be filed-

- by handing the document to the office of the provincial registrar at the address listed in Schedule One to the rules;
- by sending a copy of the document by registered post to the office of the provincial registrar at the address listed in Schedule One; or
- by faxing the document to the office of the provincial registrar at a number listed in Schedule One to the rules.

3.5.2 A document is filed with the Commission when-

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

3.5.3 A party must only file the original of a document filed by fax, if requested to do so by the Commission 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 the CCMA give notice of a set down?

3.6.1 Neither the LRA nor the Regulations nor the rules prescribe in what manner the CCMA may notify the parties of the set down of a process for hearing.

3.6.2 It is permissible to 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 e-mail 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 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 Irrespective of 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, such as, phoning them or sending them sms's or e-mails 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 or an email. However, if a party was phoned or if a sms or e-mail 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 calculated?[11]

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 the 8th 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 find application 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 Commission must give the parties at least 14 days notice in writing of a conciliation hearing, unless the parties agree to a shorter period of notice.[12]

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

3.9.1 The Commission 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 notice.[13]

3.10 What notice must be given of an arbitration hearing?

3.10.1 The Commission must give the parties at least 21 days notice, in writing, of an arbitration hearing, unless the parties agree to a shorter period. [14] This period applies to part heard arbitrations as well.

3.11 What notice must be given of a pre-dismissal arbitration hearing?

3.11.1 14 days notice must be given of a pre-dismissal arbitration hearing unless otherwise agreed.[15]

3.12 Within what time period must notice be given of a pre-dismissal arbitration hearing?

3.12.1 Within 21 days of receiving the request for a pre-dismissal arbitration hearing and payment of the prescribed fee.[16]

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

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?

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 stage.[17]

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.

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[1] Rule 5 (1)(a).
[2] Rule 5 (1)(b).
[3] Rule 5 (1)(c).
[4] Rule 5 (1)(d).
[5] Rule 5 (2).
[7] Rule 5 (3).
[8] Rule 5 (4)
[9] Rule 6.

[10] Rule 7.
[11] Rules 3 and 8.
[12] Rule 11.
[13] Rule 17 (1) read with rule17 (8) and rule 11.
[14] Rule 21.
[15] Rule 34 (5).
[16] Rule 34 (4).
[17] *P Moeller & Co (Pty) Ltd v Levendal* [2002] 8 BLLR 782 (LC)).

Chapter 4: Representation

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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 CCMA 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 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 members.[1] 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) regulates the right to representation in conciliation proceedings and provides that a party may appear in person or be represented only by -

- a director or employee of that party and, if the party is a close corporation, also by a member thereof; or
- any member, office bearer or official of that party's registered trade union or registered employers' organisation.

4.1.4 Rule 25 (2) (b) regulates the right to representation in arbitration proceedings generally, (save for the exceptions referred to in the next sub–paragraph hereunder), and provides that a party may appear in person or be represented only by -

- a legal practitioner[2];
- a director or employee of that party and, if the party is a close corporation, also by a member thereof; or
- any member, office bearer or official of that party's registered trade union or registered employers' organisation.

4.1.5 Rule 25 (2) (c) regulates the right to representation in arbitration proceedings where the dispute is about the fairness of a dismissal and a party[3] has alleged that the reason for the dismissal relates to the employee's conduct or capacity and it in effect provides that the general rule[4] applies, except that a party is not allowed to be represented by a legal practitioner unless -

- 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 the factors referred to in the sub–rule.[5]

4.1.6 Rule 17 (6) regulates the general right to representation in con-arb proceedings and provides that a party may appear in person or be represented only by -

- a legal practitioner (save for the exceptions referred to in the next sub-paragraph hereunder);
- a director or employee of that party and, if the party is a close corporation, also by a member thereof; or
- any member, office bearer or official of that party's registered trade union or registered employers' organisation.

4.1.7 Rule 17 (7) regulates the right to representation in con-arb proceedings about an unfair dismissal dispute where a party[6] has alleged that the reason

for the dismissal relates to the employee's conduct or capacity and in effect provides that a party may in such a case only be represented by a legal practitioner *"in the circumstances contemplated"* in the rules.[7] A legal practitioner may therefore not represent a party during the conciliation part of a con-arb process.

4.1.8 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.[8]

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 a member, 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 or a member, depending whether it is a company or a close corporation; and/or

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 4.1.8 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.[9]

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 CCMA[10], as well as disputes about-

- the interpretation or application of collective agreements;
- 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.

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 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.[11]

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.[12]

4.6.2 Whenever parties seek advice as to how to go about applying for legal representation to be allowed, 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 CMA 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 to be allowed, 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 does not have the power to grant or refuse consent at a mere whim but must exercise a 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.[13]

4.8 What should a commissioner consider in deciding whether to allow legal representation where one party does not consent to legal representation?

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.[14]

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.

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.[15] 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.[16]

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 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 party[17] but is more general than that and also arises 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;[18] 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.[19]

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 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.[20] The CCMA informs commissioners of such entries and deletions and commissioners should not allow a member, 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.

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 a member, official or office bearer of a trade union or an employers' organisation, to establish each of the following -

- that the representative is a member, 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 or, in the case of a member, a current membership card should generally be regarded as sufficient proof unless it is challenged;

- 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.

4.10.6 Only a natural person may represent an employer party on the basis that they are fellow members of an employers' organisation.Only employers may be members of an employers' organisations and therefore, provided that they meet all the other requirements, it is only possible for sole proprietors who are themselves employers, to qualify to represent other employer parties on the basis of fellow membership of an employers' organisation. Directors of companies, members of close corporations and employees of companies and close corporations are not employers and are therefore not entitled to be members of employers' organisations. Such persons may not be allowed to represent employer parties to a dispute on the basis that they are fellow members of an employers' organisation. The fact that the company or close corporation of which they are directors, members or employees, belongs to an employer organisation, does not qualify them to represent other members of the 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.[21]

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.[22]

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?

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.

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[1] Section115 (2A) (k) and rules 25 (2) and 17 (6).
[2] In terms of Section 213 "legal practitioner" means any person admitted to practice as an advocate or attorney in the Republic and a candidate attorney may therefore not represent a party in CCMA processes. See *Colyer v Drager SA (Pty) Ltd* [1997] 2 BLLR 184 (CCMA).
[3] The words "a party" indicate that the rule also applies if an employer party has alleged that the reason for the dismissal related to conduct or capacity even if the employee party in such a case has alleged that the reason for the dismissal was different.
[4] Rule 25 (2) (b), dealt with in paragraph 4.1.4.
[5] On a literal interpretation of rule 25 (2) (c), if a commissioner makes a ruling that it is unreasonable to expect one of the parties to deal with the dispute without legal representation, then all parties become entitled to legal representation.
[6] The words "the party" should be interpreted as "a party" and means any party.
[7] This is a reference to rules 25 (2) (a) to (c).See rule 17 (8).
[8] 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.
[9] 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).
[10] As may, for example, be done in disputes involving automatically unfair dismissals, dismissal for operational requirements involving more than one employee, dismissal for participation in an unprotected strike, dismissal as a result of a closed shop agreement and unfair discrimination (as envisaged by the EEA).
[11] See Chapter 15.
[12] *Scholtz v Maseko NO & others* [2000] 9 [BLLR] 1111 (LC).
[13] *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.
[14] *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.
[15] Strydom v CCMA and others [2004] 10 BLLR 1032 (LC) at1038- 9.
[16] 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.
[17] Rule 22 (2).
[18] Rule 25 (3).
[19] Rule 25 (3).
[20] Section 109 (2).
[21] *SA Post Office Ltd v Govender & others* [2003] 8 BLLR 818 (LC).
[22] See rule13 (2) regarding the position at conciliation. Note that matters may not be dismissed at conciliation.

Chapter 5 - The referral of a dispute and initial administration

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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.

5.2.3 Only a dismissed employee may refer a dismissal dispute to the CCMA[1] and only an employee who has been dismissed for operational requirements may

refer a severance pay dispute to the CCMA[2]. Further, only an employee may refer an unfair labour practice dispute[3] 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 association[4] or discrimination[5]. 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;
- 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 How is the referral form, LRA Form 7.11, completed?

5.4.1 The LRA Form 7.11 consists of two parts. Part A relates to general information regarding all disputes, while Part B relates to unfair dismissal disputes only.

5.4.2 A referring party completes the referral form by filling in various blank spaces and ticking appropriate boxes. Anyone can assist a party to complete the form, including a CCMA case management officer (CMO), a legal or union representative, a labour consultant or even a friend.

5.4.3 The instructions on the left hand side of the form assist the referring party to complete the document.

5.4.4 **Part A,** Item1 (a), of the referral form, deals with the details of the referring party. The referring party should specify his/her full name, identity number and correct contact details (postal address or fax number). The CCMA uses these details to send notices and other documents to the referring party.

5.4.5 When a trade union or employers' organisation refers a dispute on behalf of its members, it must complete the section in Item 1 (b).

5.4.6 Where more than one employee refers a dispute, a list of the full names and identity numbers of all the employees that are party to the dispute should be attached to the referral form.[6] The same rule applies when a union refers the dispute on behalf of its members.

5.4.7 The referring party should specify the full name and correct contact details of the other party under Item 2 of the referral form. The CCMA will use these contact details to send notices and other documents to the other party to the dispute.

5.4.8 Item 3 lists a number of boxes. The referring party must advise the CCMA what the nature of the dispute is, by ticking a box. More information must be supplied under the heading 'Summarise the facts of the dispute you are referring'.

5.4.9 At Item 4, fill in when (the date) and where (the town or city) the dispute arose. This will inform the CCMA whether it has jurisdiction as it-

- establishes whether the dispute was referred in time, and
- determines which CCMA office should deal with the dispute.

5.4.10 Item 5 establishes whether the referring party has exhausted all internal procedures at the workplace and that the referral is not premature.

5.4.11 Item 6 requires the referring party to specify how he would like the dispute to be resolved at conciliation.

5.4.12 At Item 7 the referring party must identify the industry in which the dispute arose by ticking the correct box. This assists the CCMA to determine jurisdiction by establishing that the dispute does not fall in a sector that is under a bargaining council.

5.4.13 Item 8 invites the referring party to indicate whether the assistance of an interpreter is required at conciliation or the con-arb and what official South African language (usually the referring party's mother tongue) the interpreter must speak. If no interpreter is requested, the proceedings will be in English.

Note: The CCMA provides interpreters that speak the official languages of South Africa only. If the services of an interpreter who speaks any other

language is required, the referring party may arrange (and has to pay) for such an interpreter.

5.4.14 Item 9 allows the referring party to provide any other information that he wants to be considered regarding his dispute. An example would be that the matter is urgent or that important legal or labour issues will be raised.

5.4.15 Item 10 deals with a dispute about a unilateral change to terms and conditions of employment. This section must only be signed if the dispute relates to a unilateral change to terms and conditions of employment.

5.4.16 Item 11 allows the referring party to object to the con-arb process. If the referring party signs this section it means that the arbitration will not follow immediately after conciliation – the arbitration will be set down on a different date.

Note: A referring party may, however, not object to con-arb where the dispute relates to probation.

5.4.17 Item 12 requires the referring party to date and sign the referral form. The signature confirms that the information provided is correct.

Note: A referral form may be signed by-

- a referring party; and
- where there is more than one referring party, by one party who has been mandated by the others to sign; or
- a representative who is entitled to represent the referring party (or parties) in terms of the LRA or the CCMA Rules[7]. Generally, such representative includes a trade union representative, a representative from an employers' organisation and an attorney.

5.4.18 **Part B** of the referral form should only be completed if the dispute relates to an unfair dismissal.

5.4.19 Item 1 of Part B requires the referring party to specify when he/she started working for the employer.

5.4.20 Item 2 of Part B requires the referring party to specify the date on which he/she was dismissed and whether he/she was informed of the dismissal in writing or orally. This information is important as it establishes whether the dispute is referred in time. (If it isn't, the CCMA does not have jurisdiction to determine the dispute until an application for condonation has been filed and granted).

5.4.21 Item 3 of Part B deals with the reason for dismissal. Identify the reason that was given for the dismissal by ticking one box only. This information is important at the pre-con or conciliation respectively, as different procedures are followed for different reasons for dismissal.

5.4.22 At Item 4 of Part B the referring party must specify whether the dismissal relates to probation. This information is used to schedule the matter for con-arb despite any objection to con-arb under item 11 in Part A.

5.4.23 Item 5 deals with the fairness or unfairness of the dispute. Where the referring party specifies that his dismissal was procedurally or substantively unfair, he is required to give details of the alleged unfairness.

5.5 How are parties to a dispute cited on a referral document?

5.5.1 The parties to the dispute must be described in a correct and legal manner. Where a CMO from the CCMA screening and allocations team (SAT) assists the referring party in completing a referral document, the CMO should ensure that the parties to the dispute are correctly cited.

5.5.2 The CCMA will use this information to notify the parties to attend proceedings. If a notice is sent to a wrong or incorrectly described person, such person will not attend the proceedings, resulting not only in a waste of time and resources, but any resulting arbitration award will be unenforceable.

5.5.3 The information that may assist the referring party or the CMO to cite the other party to the dispute correctly, may be found, among other things, on-

- a payslip;
- an employment contract or letter of appointment;
- a letter of dismissal or other disciplinary form;
- a letterhead or any other official document, including a business card; or
- any cheque issued by the other party.

5.5.4 Where the referring party is a trade union it is sufficient to cite only the name of the union. It is not necessary to list all the names of the employees (or union members) whom the union alleges have been unfairly dismissed[8] or who may embark upon strike action[9].

5.5.5 The CMO should establish whether the employer is a natural person, for example, 'Joanne Smith' and 'Mr Sipho Cele' or a juristic person, for example, 'J Smith CC' and 'Cele Consultants (Pty) Ltd'.

5.5.6 Where the employer is a natural person, the CMO should further establish whether the employer trades in his own name, under a different name, or as a partnership.

5.5.7 Where the employer is a **natural person who trades in his own name** or employs an employee in his personal capacity, his full names should be included in the citation, for example, 'Mr T Taku'. Such an employer is personally liable to comply with an arbitration award.

5.5.8 Where the employer is **a natural person trading under a different name** as a sole proprietor, the full trading name should be included in the citation, for example, 'Mr T Taku t/a (trading as) Value Supermarket'.The person that

owns and runs the business is personally liable to comply with an arbitration award.

5.5.9 Where the employers are **persons trading as a partnership**, the full name of the partnership and the names of all the individuals making up the partnership should be included in the citation, for example, 'Oosthuizen and Ndlovu Painters', a partnership consisting of Mr P Oosthuizen and Mr Z Ndlovu'. A partnership has no legal personality. It is merely a combination of persons associated together for a certain lawful purpose. Accordingly, a partnership does not exist apart from, or in extension to, the individuals (normally, but not necessarily, natural persons) who make up the partnership. In terms of common law, a partnership cannot sue or be sued in its own name and every member of the partnership must be joined and cited by name, failing which a summons is bad for misjoinder, as it incorrectly describes the employer party. The civil courts have overcome this problem by introducing a rule that allows partners to be sued in the name of the partnership. Although no such rule exists in the CCMA, the CCMA adopts the same approach. The persons that own and run the partnership are personally and jointly and severally, liable to comply with an award.

5.5.10 Where the employer is **a juristic person**, the CMO should establish whether the employer is a close corporation, a private company or a public company. It must be borne in mind that a claim against a juristic entity is not a claim against a manager, director or CEO of the entity but against the entity itself as a separate legal person.

5.5.11 Where the employer is a **close corporation**, the full name of the entity should be included in the citation followed by the letters "CC", which are short for close corporation, for example, 'BB Supermarket CC'. The members of a close corporation are generally not liable in their personal capacities for the liabilities of the close corporation. The close corporation is liable to comply with an arbitration award.

5.5.12 Where the employer is a **private company**, the full name of the entity should be included in the citation followed by the letters "(Pty) Ltd", for example, 'G A Anderson & Sons (Pty) Ltd'. It is sufficient to cite only the trading name of a private company.[10] The directors of a private company are generally not liable in their personal capacities for the liabilities of the company. The private company is liable to comply with an arbitration award.

5.5.13 Where the employer is a **public company**, the full name of the entity should be included in the citation, followed by the letters "Ltd", for example, 'G A Anderson & Sons Ltd'. The directors of a public company are generally not liable in their personal capacities for the liabilities of the company. The public company is liable to comply with an arbitration award.

5.5.14 The CMO should keep in mind that where the employer is a close corporation, private or public company, no further details, such as, the name of the directors, should be added or referred to in the citation. Such additions

will create confusion regarding liability for the actions of the legal entity and will render any award unenforceable, until the citation has been corrected.

5.5.15 Other juristic persons that may be employers, include-

- The Post Office, which should also be cited with reference to the branch, for example, 'SA Post Office, Braamfontein Branch'.
- Trusts, which should be cited by full name, for example, 'Cape Vaal Trust', or 'John Monemore Family Trust'. No further details, such as, the names of the trustees, are required as the trustees are not liable in their personal capacities for the actions of the trust. The trust is liable to comply with an arbitration award.
- Municipalities, which should be cited by full name, for example, 'Maquassi Hills Municipality' or 'Johannesburg City Council'.
- Clubs and voluntary associations, which should be referred to by full name, for example, 'Glendower Golf Club', 'Braamfontein Tennis Club' or 'The Association for SA Valuators'. Once again no further details, such as, the names of members of these entities, are required as the members are not liable in their personal capacities for the actions of the club or voluntary association. The club or voluntary association is liable to comply with an arbitration award.
- Churches, which should be cited according to the known name, for example, 'Baptist Church, Corlett Drive' or 'The Family Values Church, Edenvale'. A church is a voluntary association.
- The State or departments of State, which should be referred to by the correct name, for example, 'SA Reserve Bank', 'KwaZulu-Natal Department of Transport' or 'National Department of Commerce'. The respondent party is the Minister of the Department or the Member of the Executive Council of the particular province, not the Director General of the department. [11]
- Foreign Employers. Generally foreign states are not immune from the jurisdiction of the CCMA and the Labour Court with regard to contracts of employment between individuals and the foreign state, provided certain conditions are met. In this regard refer to Chapter 28.

5.5.16 Where the referring party or the CMO assisting such party is not sure of the correct name of the other party to the dispute, it is best practice to **cite all possible parties in the alternative**[12]**,** for example, "Fix-a-leak Plumbers, alternatively, John Smith". The obligation is then on the commissioner to determine the correct party to the dispute.

5.5.17 When the citation is wrong, the referring party may apply for the correction of the error or defect in the citation[13] or for the substitution of the incorrect party with the correct party[14].

5.5.18 When dealing with a dispute where a party has been incorrectly cited, a commissioner should bear in mind that the issue is whether the correct party is at conciliation or arbitration. The test is-

- whether a party has only been incorrectly described (this can be corrected/amended at conciliation or arbitration in the presence of both parties); or

- whether an entirely different party has been cited[15] (and should be substituted by the correct party).

5.5.19 Matters should not be dismissed simply because a party has been incorrectly described. If the correct party is not present, the citation should be amended, and the proceedings should be adjourned so that the notice of set down may be served on the correct party.

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

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

5.6.2 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.[16]

5.6.3 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.[17]

5.6.4 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.[18]

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

5.6.6 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**.**

5.6.7 Specified time periods must be calculated in terms of calendar days.

5.7 How is a referral document served and filed?

5.7.1 Generally, a referring party must serve a copy of the referral form or the request for arbitration on the other party by hand delivery, fax, registered mail, telegram or leaving a copy at the premises of the other party.[19] See Chapter 3.

5.7.2 The referring party must attach proof of service of the referral document, before filing the referral document with the CCMA.[20]

5.7.3 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 or fax.[21]

5.8 How is a referral document screened?

5.8.1 A referral form is screened by a CMO from SAT.

5.8.2 When screening a referral form, the CMO should check:

- that the referral form has been completed in full and is signed;
- that the other party to the dispute is specified;
- that the contact details of both parties are complete, so that they can be notified of proceedings;
- that where more than one employee is referring a dispute, a list of all the employees to the dispute is attached to the referral form;
- that a box has been ticked under item 3 of Part A (nature of the dispute), of the referral form;
- that the dispute is referred in time and, if not, that an application for condonation is attached to the referral form;
- that the dispute does not fall within the jurisdiction of a bargaining council;
- that the referring party has attached proof of service (of the referral form) on the other party;
- if all the above requirements have been met, whether the dispute can be dealt with at pre-con.

5.9 When is the referral form valid?

5.9.1 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/fax numbers (essential)
- signature by applicant/authorised representative (essential)
- nature of the dispute (essential)
- date of dispute (essential)
- area where dispute arose
- outcome sought [e.g. claim for statutory wages]
- application for condonation [where applicable]
- proof of service (essential)

5.9.2 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.

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

5.10 How is a referral administered?

5.10.1 The CMO who screened the form should place a date stamp on all valid referral forms before data capturing occurs.

5.10.2 All the relevant information should be captured on the CMS whereafter the process (for example, in-limine, pre-con, conciliation or con-arb) must be selected. Once captured, the system will generate a case number that the CMO must write on the referral form.

5.10.3 In the next step a case file must be created and tagged with the case number. The referral form must be placed inside the file together with the dispute printout generated on the system. These pages contain information such as-

- when the case was created on the system;
- when the 30-day period expires for conciliating the dispute;
- the nature of the dispute; and
- the process to be conducted.

5.10.4 If the dispute will be dealt with at pre-con, the CMO who captured the referral on the system must give the file to a commissioner or another CMO to conduct a pre-con.

5.10.5 If the dispute is **resolved** at pre-con-

- a certificate of resolution (signed by the duty commissioner) and a settlement agreement (signed by the parties) must be placed inside the file;
- the file should be closed ;
- relevant case notes should be made on the system; and
- the file should be sent to archives.

5.10.6 If the dispute is **not resolved** at pre-con-

- relevant case notes should be made on the system;
- the referral form is placed in the file;
- the case number must be recorded in the allocations book;
- the case book must be given to the case management officer (CMO), who is the team leader for the month;
- the matter should be processed for allocation to a commissioner;
- the CSC or his delegate must allocate the files on paper by recording the names of commissioners against specific case numbers bearing in mind the 30-day period during which the dispute must be conciliated;
- the files must be distributed to the CMOs who must, in respect of each file, schedule on the system the nature of the process, date and time of the proceedings, as well as the name of the commissioner assigned;
- the CMO must print out the notice of set down that is generated by the system and serve it on the parties by registered mail or fax and place proof of service (fax transmission slip or the registered mail slip obtained from the administration department) in the file;

- the file must then be placed with the other files that are set down for the same date and these must be recorded on the roll or if the matter is not on the roll, the file must be left in the relevant commissioner's basket; and
- the commissioner concerned will deal with the dispute at conciliation, con-arb or arbitration.

5.10.7 When a referral form is hand-delivered to the CCMA and a quick perusal shows it to be defective, the CMO must inform the referring party of the defect and assist with the correction thereof.

5.10.8 If a defective referral form is sent to the CCMA by registered mail or fax, the CMO who is responsible for the data capturing must write to the referring party, advising of the defect and explaining how to rectify it. Thereafter the file should be closed and sent to the archives where it remains until the corrected referral form is received where after the file is re-opened under the same case number.

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

5.11.1 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.[22]

5.12 **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?**

5.12.1 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.[23]

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

5.13.1 The CCMA should refer the referral to the bargaining council.

5.13.2 In such event, the date of the CCMA's initial receipt of the dispute will be deemed to be the date on which the CCMA referred the dispute to the bargaining council.[24]

5.14 **Does the right to refer a dispute prescribe?**

5.14.1 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.

5.15 **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?**

5.15.1 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.

5.15.2 The claim for such statutory monies must be included in the initial referral (Form 7.11) otherwise the arbitrating commissioner will be precluded from making an order relating to payment of such statutory monies.[25]

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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.
[6] Rule 4(2) of the CCMA Rules.
[7] Rule 4 of the CCMA Rules.
[8] *National Union of Mineworkers v Hernic Exploration (Pty) Ltd* (2003) 24 ILJ 787 (LAC).
[9] *Afrox Ltd v SACWU & others* (1997) 4 BLLR 375 (LC).
[10] *Mathoae & 'n ander v BS Auto Service t/a Kwaggasrand Motors* (1992) 13 ILJ 976 (LAC).
[11] *Public Servants Association of SA v Director General: Northern Provincial Administration* (2000) 21 ILJ 417 (LC).
[12] *Richards Bay Iron Titanium (Pty) Ltd t/a Richards Bay Minerals v Quest Personnel (Pty) Ltd* (1998) 9 SALLR 79 (LC).
[13] Rule 27 of the CCMA Rules.
[14] Rule 26(6) of the CCMA Rules.
[15] *Straub v Barrow NO* (2001) 6 BLLR 679 (LC) and *Lambrecht v Pienaar Brothers (Pty) Ltd* (1998) 6 BLLR 608 (LC).
[16] Section 191 (1) (b) (i) of the LRA.
[17] Section 191 (1) (b) (ii) of the LRA.
[18] Section 10 (2) of EEA .
[19] Rule 5 of the CCMA Rules .
[20] Rule 6 of the CCMA Rules .
[21] Rule 7 of the CCMA Rules .
[22] *P Moeller & Co (Pty) Ltd v Levendal & others* (2002) 8 BLLR 782 (LC).
[23] *Liberty Life Association of South Africa Ltd v Hiemstra & others* (2001) 6 BLLR 620 (LC).
[24] Section147(7).
[25] *Douglas & others v Gauteng MEC for Health* [2008] 5 BLLR 401 (LC).

Chapter 6: The pre-conciliation

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6.2 Who may conduct a pre-conciliation process?
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6.5 What are the guidelines for conducting a pre-conciliation?
6.6 What are the CCMA's obligations once the pre-conciliation is completed?
6.7 What are the advantages of the pre-con process?

6.1 What is a pre-conciliation?

6.1.1 In terms of Rule 12 the Commission 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?

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 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 employer's 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.

- 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.

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

Chapter 7: Con-arb

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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.[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.

7.2.2 The con-arb process **must** be followed if the dispute concerns[2]-

- 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 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.[3]

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.[4] 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.[5] 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. In this regard the commissioner should facilitate service of the request for arbitration by making the form available to

the employee to complete and advising the employee that service on the employer can be effected there and then or on another date in any manner specified in the rules. Where the employee chooses to serve the request for arbitration on the same date of the con-arb, the commissioner should advise the employer to accept service and to acknowledge in writing that service has been effected.Where the employee chooses to serve the request for arbitration on another date, the commissioner should advise the employee of the 90-day period within which to serve and file the form and the consequences of failing to do so timeously.

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. However, where the arbitration is scheduled in error without such proof, the request for arbitration may be completed and served on the employer on the date the matter is scheduled for arbitration. If the request for arbitration is late it must be accompanied by an application for condonation. The arbitration may then proceed on that day, if the employer consents. Where the employer does not consent to the arbitration proceeding on the scheduled date, the case file, containing the request for arbitration form, proof of service thereof and the certificate of non- resolution, should be forwarded to registry for the arbitration to be scheduled for another day. If there is an application for condonation of a late request for arbitration, the condonation application should as far as possible be considered on the day and a ruling made. The employer's right to file an answering affidavit should however be taken into account.

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.[6]

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.

7.9.2 Where the dispute is settled at conciliation, the commissioner must ensure that the parties sign a settlement agreement and thereafter issue a certificate of resolution.

7.9.3 Where the dispute is unresolved at conciliation, the commissioner should issue a certificate of non-resolution and proceed to arbitrate the matter immediately thereafter. However, where there is insufficient time to arbitrate the matter, the commissioner should adjourn the arbitration and obtain an alternative date from the CCMA that suits all parties and require the parties to acknowledge receipt of the notice of set down in writing or advise the parties that notice of arbitration will be sent to them.[7] In this instance, the employee does not need to serve and file a request for arbitration form before the matter can be rescheduled for arbitration.

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 The con-arb process retains the procedures and content of the processes of conciliation and arbitration but it eliminates the time lag between the conciliation session and the commencement of the arbitration.[8] 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. If there is no apparent reason for the non-attendance of the employer party the discretion should generally be exercised in favour of continuing with the arbitration process in the absence of the employer party.[9]

7.10.2 In the event that the commissioner is not satisfied that the employer was notified of the hearing, the commissioner should postpone the arbitration and forward the file to registry to reschedule the hearing for 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 then 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 Chapter 4, which deals with representation.[10]

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.[11] It is to be noted, however, that it is not necessary for the same commissioner to arbitrate a dispute that remains unresolved at the conciliation as part of a con-arb process and the arbitration may be done by a different commissioner.

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?

7.16.1 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. Accordingly, such objection to the con-arb is paramount and should be respected regardless of the merits of the objection.

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[1] *Ceramic Industries Ltd v CCMA & another* (2005) 12 BLLR 123)5 (LC).
[2] Section 191(5A).
[3] Rule 17(1).
[4] Rule 17(3).
[5] Rule 17(2).
[6] *Premier Gauteng & others v Ramabulana NO & others* [2008] 4 BLLR 299 (LAC).
[7] Rule 17(9).
[8] *Ceramic Industries Ltd v CCMA & another* (supra).
[9] A contrary view was expressed in *Inzuzu I.T. Consulting (Pty) Ltd v CCMA & others*, unreported Labour Court Case No P487/2009, but the fact that rule 17(4) read with rule 30 and section 191 (5A) provides that the arbitration may continue in the absence of the employer party, was not considered. The *Inzuzu I.T.* case conflicts with the *Ceramic Industries* case and commissioners should follow the last mentioned case.
[10] Also refer to sub-rules (6) and (7) of Rule 17.
[11] Rule 17(8).

Chapter 8: Conciliation

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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 arose[2] (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]

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. (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 and must contain-

- the names of the parties;
- the addresses and contact details of the parties;
- the case reference number;
- the type of dispute;
- the type of process;
- the date and time of the process;
- the venue of the hearing;
- the name of the commissioner, if allocated;
- the language to be used;
- brief information about the conciliation process and the right to representation.

8.3.2 The period of the notice must not be less than 14 days unless the parties consent to a shorter period. However, parties are not compelled to agree to a shorter period. The notice must be given at least 14 days before the date scheduled for the hearing. The period could be longer and must be computed from the day on which the parties are notified of the conciliation hearing.

8.3.3 In calculating the notice period and to allow for the full notice period before the specified day of the hearing, the first day is excluded and the last day is included. The last day must also be excluded if it falls on a Saturday, Sunday or public holiday or on a day during the period between 16 December to 7 January.[5]

8.3.4 If notice is given by registered post it is presumed that the notice was received by the person to whom it was sent 7 days after it was posted and this must be taken into account in determining whether sufficient notice was given.[6]

8.3.5 If short notice is given such defect can be cured if the parties agree to a shorter period of notice. The parties' participation in the conciliation proceedings without objection may be construed as an agreement to the short period. 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 hearing. If the aggrieved party fails to raise the defective service or ignorantly or deliberately refrains from raising an objection on the date of the hearing, that party cannot challenge it at a later stage[7].

8.4 Who may represent a party at conciliation?

8.4.1 A party may appear in person or be represented only by-

- a director or employee of that party and, if the party is a close corporation, also by a member thereof; or
- any member, office bearer or official of that party's registered trade union or registered employers' organisation.

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.[8]

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;
- 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 conciliator must control the process;

8.5.4 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;

8.5.5 The conciliator should create a comfortable environment that is conducive to settlement and should promote effective and fair participation;

8.5.6 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;

8.5.7 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;

8.5.8 The conciliator must ensure that any settlement agreement is enforceable and give guidance to the parties in this regard;

8.5.9 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.[9] 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 Advising parties about the risks involved in allowing the matter to proceed to arbitration, adjudication or strike action, including what it would cost.

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

8.7.3 Suggesting to parties that they should compromise at a point somewhere between their positions as it were when the deadlock was reached.

8.7.4 Suggesting that the parties should disclose their bottom lines.

8.7.5 Making suggestions as to other options available to the parties.

8.7.6 Making a recommendation as to a fair basis on which the dispute may be settled.

8.7.7 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 real dispute between the parties. A certificate of non-resolution should contain the correct description of the real dispute that was referred to conciliation.[10]

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.[11]

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);
- 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/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.

8.11.3 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;

- 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 Commission;

- leave the parties with a good impression of the Commission and its dispute resolution system; and

- complete the outcome report and file it with the Commission.

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.[12]

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 objections[13] 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);[14]
- 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;[15]
- 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 CCMA) 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 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.[16]

8.14.2 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 commissioner appointed to conciliate the matter should prior to the conciliation make a ruling whether or not it was sufficiently alleged that an employment relationship existed.[17] If that was sufficiently alleged, a ruling should be made that the CCMA has jurisdiction to conciliate. It should, however, be made clear that such ruling is not to the effect that an employment relationship existed and that that is an issue that should be decided at arbitration.

8.14.3 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.[18]

8.14.4 It is debatable whether a ruling whether or not the dispute was settled earlier should be made at the conciliation stage. It is arguable,having regard thereto that the definition of "dispute" in the LRA includes an

alleged dispute, that it is sufficient to allege that the dispute still exists. On the other hand, the conciliating commissioner is required to certify that the dispute remains unresolved. In the absence of an agreement to leave the issue for decision by the arbitrating commissioner, it is left to the commissioner appointed to conciliate the matter, to decide whether or not to rule on the issue at conciliation. If a decision is made to rule on the issue at conciliation, evidence must be heard if there is a factual dispute.[19] If the conciliator elects to leave the issue for decision by the arbitrator it should be indicated on the certificate that the dispute that remains unresolved includes a dispute about whether the matter was settled or not.

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.[20] 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.

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.[21]

8.17 What is a Redline matter?

8.17.1 A Redline matter is any dispute referred to the CCMA, where-

- 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 province, 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 province that could affect that province, other provinces or the country as a whole; or

- the dispute is of a precedent setting nature that has the potential to impact consequentially on labour relations on a wider scale; or

- the dispute involves the dismissal of any high profile individual or an unfair labour practice involving any high profile individual.

8.18 What procedure should be followed when a Redline matter is erroneously set down in a province?

8.18.1 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 province.

8.18.2 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 province 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.

8.18.3 The convening senior commissioner must bring the matter to the attention of the National Office to enable the national senior commissioner dealing with mediation and conciliation to give appropriate directives.

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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 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 *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).

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

[5] Rule 3.

[6] Rule 8.

[7] See *P Moeller & Co (Pty) Ltd v Levendal* [2002] 8 BLLR 782 (LC).

[8] Rule14. Jurisdictional rulings are dealt with under the Chapter dealing with Applications.

[9] In terms of section 126(3), the Commission 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.

[10] *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).

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

[12] Insofar as rules 30 and 13 (2) purport to permit the dismissal of a matter if the referring party fails to appear at conciliation, they are in conflict with the provisions of the LRA and *ultra vires* in that the CCMA did not have the power to make such rules. See *Premier of Gauteng & another v Ramabulana & others* [2008] 4 BLLR 299 (LAC).

[13] *Bombardier Transportation (Pty) Ltd v Lungile Mtiya N.O & others (supra).*

[14] *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.

[15] *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 (supra).*

[16] 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).*

[17] See footnote 3 above.

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

[19] See *Bombardier Transportation (Pty) Ltd v Lungile Mtiya N.O & others (supra)* at par 15.

[20] Ibid.

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

Chapter 9: The certificate: LRA Form 7.12

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9.14 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?
9.15 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;

- that the conciliator ruled that the referral was timeously effected (where applicable);
- 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 parties categorised the dispute by agreement, alternatively, how it was categorised by the referring party; 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 agreed between the parties at conciliation;

- 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.

9.5.2 Once a deliberate decision was made and the parties were notified of such decision, the decision may not be changed even if it is subsequently discovered that it was a wrong decision. In such event the certificate may only be changed by agreement between the parties or on review by the Labour Court, e.g. where the conciliator deliberately indicated on the certificate that the dispute was resolved when that was in fact not the case.

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; an issue that is required to be proven before an arbitration or adjudication may be requested.[2]

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.[3]

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 unresolved, alternatively, after the expiry of 30 days or any agreed extended period since 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.[4]

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 because that power is reserved for the Labour Court. 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.

9.7 Must a certificate of outcome identify the nature of the dispute as described in the referral document only?

9.7.1 A certificate of outcome must identify the nature of the dispute as described in the referral document or as agreed by the parties during the conciliation process.[5] Any agreement identifying the nature of the dispute must be in writing and entered into on a with prejudice basis. In the absence of agreement between the parties the certificate of outcome must reflect the nature of the dispute as described in the referral document.

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

9.8.1 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.

9.8.2 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 Commission 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.[6] 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.

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9.8.3 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 further the true dispute that was referred to conciliation and to give a correct description of the dispute. What the parties are bound by is the correct description of the real dispute that was referred to conciliation.

9.8.4 It is not the conciliating commissioner to whom the LRA gives the power to refer a dismissal dispute to the Labour Court.That right is given to the dismissed employee and therefore the parties are not bound by the commissioner's description of the dispute.

9.8.5 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.

9.9 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.

9.9.1 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.

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

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

9.10.2 A certificate may only be set aside on review by the Labour Court or if the parties consent in writing to abandoning the certificate and agree to resume the conciliation.

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

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

9.11.1 Under no circumstances. Once a commissioner has issued a certificate he/she becomes *functus officio* and may not continue to conciliate except in terms of Section 150 with the consent of both parties.[6] 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.

9.12 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?

9.12.1 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 that employee alone, the employee may elect to refer the dispute either to arbitration or to the Labour Court. The employee party would have this choice irrespective of the advice given on the certificate. He may choose to request CCMA arbitration or to refer the dispute to the Labour Court. This is important because of the higher costs and lengthier delay in referring an unresolved dismissal dispute to the Labour Court rather than arbitration. The certificate does not dictate that the employee has to take the unresolved dispute to the Labour Court.

9.13 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?

9.13.1 The dispute can be arbitrated if both parties agree to arbitration instead of Labour Court adjudication.[7]

9.13.2 Where no such agreement exists, a dispute referred by an employee who described the reason for the alleged unfair dismissal in terms that bring it squarely within the exclusive jurisdiction of the Labour Court, may not be arbitrated.

9.14 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?

9.14.1 An application for review of a certificate does not stay arbitration proceedings and a commissioner has a discretion whether to adjourn an arbitration pending the outcome of such review proceedings or to proceed with the arbitration. In this regard it would, *inter alia*, be relevant to consider whether the review application is *bona fide* or whether it was instituted merely to frustrate the applicant's attempts to have the dispute resolved. A delay in instituting the review proceedings or a failure to pursue it, will normally weigh against granting an adjournment pending the outcome of review proceedings. If an adjournment is refused the only way that the arbitration can be stayed is by a court order issued by the Labour Court directing such stay pending the outcome of the review application.

9.15 What must the arbitrator do where there is no certificate in the file and neither party can provide a copy of the certificate?

9.15.1 An arbitrator must do the following -

- Check first whether conciliation took place. There should be a register reflecting the presence of one or both parties on the date set down for conciliation;
- If there is evidence in the file that conciliation took place and the party(ies) before him confirm this, he/she must check whether 30 days have passed since the dispute was first referred to the CCMA, and if so, continue with arbitration on issuing a certificate so as to assume jurisdiction;
- If there is no evidence in the file or from a party(ies) that conciliation took place, again he must check that the referral to arbitration was made at least 30 days after the original referral to the CCMA. This too will confer jurisdiction to continue with arbitration, but it is always advisable for the arbitrator to issue a certificate as per the requirements for arbitration set out in section 136 of the LRA;
- If the original referral of the dispute was for a con-arb and neither party has objected to con-arb, it is irrelevant whether conciliation

took place and provided that at least 30 days passed after the original referral was made to the CCMA, the commissioner must continue with arbitration.

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[1] *National Union of Metal workers of SA v Driveline Technologies (Pty) Ltd & and 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 157 (4).

[3] Sections 136 (1) (b) and 191 (11).

[4] Section 64 (1) (a) (i).

[5] Rule 15.

[6] 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 Satety & 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.

[7] Section 141 (1).

Chapter 10 : Settlement agreements

Contents

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10.1 What is a settlement agreement?

10.1.1 For the purposes of this Chapter a settlement agreement is a written agreement signed by both parties in full and final settlement of a dispute that a party has 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 entered into after a referral, including during, or as a result of, 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 entered into 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 2009”, 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;
- 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 a representative is signing on behalf of any party, ensure that the representative has the necessary capacity 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;
- Allow each party an opportunity to make closing remarks;
- Complete the outcome report; and
- Comply with any particular administrative requirements the registry 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 entered into 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]

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.

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 before proceeding with the process, whether con-arb, conciliation, or arbitration. If it is common cause that the dispute was settled, a ruling must be made that there is no longer a dispute and that the CCMA does not have jurisdiction. If there is a dispute as to whether or not the matter was settled a conciliating commissioner has a discretion whether to hear evidence at conciliation and to make a ruling whether or not the dispute was settled or whether to leave the matter for decision at arbitration. At arbitration the arbitrating commissioner must require the referring party to prove as part of its case that the dispute was not settled i.e. that a dispute still exists. It would be open to the arbitrating commissioner to rule that a separate hearing be held in respect of this issue or that such issue be determined after hearing all the evidence including the evidence on the other issues in dispute.

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 The settlement agreement may be made an arbitration award and be enforced as if it were an order of the Labour Court.

10.9.2 The Commission 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 Commission, an arbitration award.[6]

10.9.3 In addition, the Labour Court has the power in terms of section 158(1)(c) to make any arbitration award or any settlement agreement an order of the Court. It is not 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 15.

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

10.1.1 A party may refer a dispute about the interpretation or application of a settlement agreement to the Commission.[8]

10.1.2 A dispute over the interpretation of a settlement agreement exists when the parties disagree over the meaning of a particular clause(s).[9]

10.1.3 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 compklied with as such an issue must be determined during enforcement proceedings such as certification proceedings or contempt proceedings.[10]

10.1.4 In terms of section 138 (9) the award may be in the form of a declaratory order.

[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 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).

[7] Section 143 (4).

[8] Section 24 (8).

[9] 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)

[10] 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 Who pays the witness fees and the travel and subsistence expenses?
11.22 What may be done if a witness, without good cause, fails to appear before the Commission after being subpoenaed?

11.1 When is a request for arbitration required?

11.1.1 A request for arbitration is not required when the dispute was validly referred for con-arb, where there was no objection to the con-arb process and where the dispute remained unresolved at the conciliation stage of the con-arb process. In such cases the arbitration will proceed immediately after the conciliation or be set down for hearing on a later date without the need for a request for arbitration.

11.1.2 In cases 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 request[1] 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 or (where applicable) within 90 days of the expiry of the 30 day period allowed for conciliation.

11.3 How does a party request the CCMA to arbitrate a dispute where it is necessary to do so?

11.3.1 A request for arbitration (LRA Form 7.13) must be completed and the certificate of non-resolution must be attached;

11.3.2 The LRA Form must be fully and correctly completed and the following should, in particular, be done-

- Under item 1 the referring party must provide all his/her contact details;
- Under item 2 the referring party is required to indicate the case number, the citation (names of the parties), the section of the LRA that requires the dispute to be arbitrated and the issues in dispute. In the case of a dismissal dispute it should, for example, be indicated whether the substantive or procedural fairness of the dismissal or both are in dispute;
- Under item 3 the referring party is required to state what outcome is sought. In an unfair dismissal dispute it could be '*retrospective reinstatement'* or '*compensation*' and in an unfair labour practice dispute it could, for example, be '*to end suspension*';

11.3.3 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;

11.3.4 The request for arbitration must be served on the other parties to the dispute in accordance with rule 6;

11.3.5 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

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

11.4 May the CCMA 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), the CCMA must refuse to accept a referral document in such circumstances and require that the defect be rectified.

11.5 What are the responsibilities of the CMO once the LRA Form 7.13 has been delivered to the CCMA?

11.5.1 The CMO must check that -

- the form has been signed in accordance with rule 4;
- valid proof of service is attached to the completed form;
- the form has been completed correctly, i.e. that the case number is the same as that on the certificate, the citation of the parties is correct, that a proper address has been supplied for the respondent, etc;
- if the form has been delivered 90 days or more after the certificate was issued, that the referring party has attached a valid condonation application to the form;

11.5.2 If one or more of the above has not been done, the CMO must refuse to accept the LRA 7.13 and hand it back to the referring party, indicating what the defects are.

11.5.3 If the form complies with the above, then the CMO must place the form in the correct case file and place it before the designated commissioner for screening.

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

11.6.1 The file should be screened by a commissioner who must check that the CCMA has jurisdiction to arbitrate and give directives regarding whether or not the matter is part heard, whether the representatives or addresses of any of the parties have changed, the time required for the arbitration and the place where the arbitration is to be held.

11.6.2 The CMO dealing with the set down must ensure that the matter is set down in accordance with the directives and, in particular, that the notices of set down are sent to the correct addresses or fax numbers of the parties.

11.6.3 The parties must be given 21 days notice of the arbitration hearing and the days must be calculated in accordance with paragraph 3.7 above.

11.6.4 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.

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

11.7.1 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]

11.7.2 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.

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

11.8 What is a pre-arbitration conference?

11.8.1 The parties to an arbitration must hold a pre-arbitration conference if directed to do so by the Director.[3] They may also by agreement hold such a conference without such a directive.

11.8.2 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. It enables the parties to narrow the issues in dispute and allows them to prepare timeously for arbitration. The aim is to discover how the proceedings may be shortened.

11.8.3 The process 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.

11.9 What should be considered at a pre-arbitration conference?

11.9.1 The parties must attempt to reach consensus on the following -

- Any means by which the dispute may be settled;
- Facts that are agreed between the parties;

- Facts that are in dispute;
- The issues that the commissioner is required to decide;
- The precise relief claimed and, if compensation is claimed, the amount of the compensation and how it is calculated;
- The sharing and exchange of relevant documents, and the preparation of a bundle of documents in chronological order with each page numbered;
- The manner in which documentary evidence is to be dealt with, including any agreement on the status of documents and whether documents, or parts of documents, will serve as evidence of what they appear to be;
- Whether evidence on affidavit will be admitted with or without the right of any party to cross examine the person who made the affidavit;
- Which party must begin;
- The necessity for any on the spot inspection;
- Securing the presence at the Commission of any witness;
- The resolution of any preliminary points that are intended to be taken;
- The exchange of witness statements;
- Expert evidence;
- Any other means by which the proceedings may be shortened;
- An estimate of the time required for the hearing;
- The right of representation; and
- Whether an interpreter is required, and if so, for how long and for which language.

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

11.10.1 In terms of rule 20 the Director or his/her delegate may direct the parties to hold a pre-arbitration conference. It is however within a commissioner's powers to require the parties to hold a pre-arbitration conference at the commencement of an arbitration.

11.11 When should a pre-arbitration conference be held?

11.11.1 If the facts or issues in dispute are complicated and both parties are legally represented.

11.12 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?

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

11.12.2 If not settled, the parties should draw up and sign a minute, *inter alia,* 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 11.9 above.

11.12.3 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.

11.12.4 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.

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

11.13.1 Parties are bound by what is agreed or admitted in the pre-arbitration conference minute[4].

11.13.2 Agreements limiting issues may only be retracted if there are proper recognised grounds for doing so and a proper application should be brought setting out the grounds.

11.13.3 In considering applications to allow further issues to be raised, commissioners should, *inter alia,* 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.

11.14 What is a subpoena?

11.14.1 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.

11.14.2 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 or 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?

11.16.1 A subpoena may be issued by the Commission prior to the scheduled date of the hearing, or by a commissioner appointed by the commission to resolve the dispute.

11.16.2 A subpoena issued in terms of section 142 (1) 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?

11.17.1. The person requesting the subpoena must provide a motivation establishing why the evidence subpoenaed is relevant and necessary to resolve the dispute fairly.

11.17.2. The commissioner or the Commission must be satisfied that the information subpoenaed is relevant and necessary to determine the dispute fairly.

11.17.3. The party being subpoenaed must have a reasonable period (7 days) in which to comply with the subpoena and have reasonable notice of the directive to appear.

11.17.4. The party requesting the subpoena must have made arrangements to pay the witness fees and reasonable substantiated travel and subsistence expenses to the witness as required by section 142 (7) (b).

11.18 When must an application for a subpoena be made?

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

11.19 When and 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 at least 7 days before 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;

- 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?

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.

11.21 Who pays the witness fees and travel and subsistence expenses and what fees are payable?

11.21.1 The witness fees and travel 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 Commission 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 and subsistence expenses shall be borne by the Commission as provided by sections 142 (7) (a) and (c).

11.21.3 The fees payable to a witness is 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 Commission 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 Commission and the commissioner may make such finding and refer it to the Labour Court for any appropriate order.

11.22.2 Contempt of the Commission is further dealt with in Chapter 22.

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[1] Not all parties to a dispute may request arbitration. For example, only an employee party may request arbitration in respect of the disputes referred to in section 191 (5) (a).

[2] Rule 19.

[3] Rule 20.

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

Chapter 12 : Arbitrations

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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 If the referring party decides to withdraw the referral or the request for arbitration, as the case may be, and presents himself/herself at the CCMA (whether it is in order to attend a process or just to notify the CCMA of the withdrawal)-

- the CSC or a delegated senior commissioner must explain the consequences of a withdrawal to the referring party and ensure that it is clearly understood by the referring party;
- the explanation referred to in the preceding paragraph must be interpreted (where necessary);
- the prescribed withdrawal form must be completed and signed in the presence of a CSC or the delegated senior commissioner;
- the withdrawal form must be signed by the CSC or, where applicable, the delegated senior commissioner and, where applicable, the interpreter; and
- the relevant CMO must thereafter notify the other party/parties in writing of the withdrawal.

12.2.3 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.

12.2.4 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. If the referral or arbitration request is withdrawn because the CCMA is the incorrect forum this must be clearly spelt out in the withdrawal otherwise it may not be possible to pursue the dispute in the correct forum. It is not possible to later argue that the intention was to only stay the proceedings temporarily because if a need for that exists, the correct way of dealing with it is to apply for an appropriate postponement/adjournment.

12.2.5 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.

12.2.6 If the matter was already scheduled for con-arb or arbitration and there is no proof that the other party/parties have consented that the matter may be removed from the roll, the other parties must be notified on receipt of the withdrawal that the matter will be removed from the roll unless such other party within seven days requests in writing for it to remain on the roll so that any issues relating to costs may be argued. If no response is received the matter must be removed from the roll after the seven day period. If it is not possible to give the seven days notice the matter must remain on the roll for any issue about costs to be argued. In such event the parties must be notified that the matter will remain on the roll for such purpose.

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 conducted.[2]

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.[3]

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 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 folowed.

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

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;
- 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 rights-[4]

- 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.[5]

12.4.6 The arbitrator should not allow technicalities to prevent the full picture of events being placed before the arbitrator.[6]

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.

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 An arbitration generally involves the following stages-

- Introduction and housekeeping;
- Confirmation of representation;
- Dealing with preliminary issues;
- Opening statements by the parties;
- Confirmation of jurisdiction;
- Narrowing and determination of the issues to be decided;
- Decision on the form of the arbitration;
- Hearing of evidence;
- Closing of case;
- Concluding arguments;
- Closing of arbitration;
- Award.

12.6.2 The stages normally follow the sequence set out above, but it may unfold differently depending on the circumstances.

12.7 Introduction and housekeeping

12.7.1 At the start of the arbitration, the arbitrator should –

- welcome the parties;
- introduce himself/herself to the parties;
- advise them of his/her appointment to the case;
- require them to complete the attendance register;
- advise the parties of any interest the arbitrator may have with any of the parties which may give rise to potential conflict of interest in the matter, if any;
- advise the parties of the language in which the proceedings are to be conducted and if there is a need for an interpreter, ensure that an interpreter is present;
- request the parties to switch off cell phones and keep them off for the duration of the hearing;
- make arrangments for breaks;
- advise the parties how to address the arbitrator;
- ensure that the proceedings are recorded by activating the recording device and checking that it is operating.

12.7.2 Record the case number, the date of the hearing, the name of the arbitrator, the names of the parties and the names of their representatives and explain the following to the parties-

- The role of the arbitrator and in particular the arbitrator's powers to determine the manner in which the arbitration is to be conducted, to question the witnesses of the parties and to require a party to produce relevant documents;
- The rights of the parties, i.e. to give evidence, to call and question witnesses and to address concluding arguments to the arbitrator;
- The procedure to be followed during the arbitration, i.e. the stages in which the arbitration is to be conducted and what the parties are required to do during each stage;
- The consequences of not giving evidence, not calling witnesses, allowing witnesses to be present when other witnesses are testifying, not putting their cases to opposing witnesses, not disputing incorrect aspects of the evidence of opposing witnesses and not proving documentary exhibits;

- The conduct expected of the parties, e.g. not to interrupt each other, to treat witnesses with respect and not to interrupt them, to address objections to the arbitrator, etc;

- The rules of evidence;

- That the parties may at any stage during the arbitration agree to a further conciliation process.

12.7.3 The explanation referred to in the preceding paragraph should include the following-

- It is the arbitrator's role to determine the dispute fairly and quickly, which requires the arbitrator to control the proceedings;

- The party bearing the onus, (the duty on a party to prove its case regarding a disputed issue), must discharge the onus on a balance of probabilities, which means that its version relating to the disputed facts must be more probable than that of the other party;

- Once the evidence of both sides has been heard, to decide whether the party bearing the onus has discharged the onus;

- Each party will be given an opportunity to present their version, beginning with the party which bears the onus;

- Witnesses who will corroborate the evidence of other witnesses should remain outside until they are called because it may affect the probative value of their evidence if they remain inside whilst other witnesses give evidence, unless the party wants them to remain inside.

12.8 Confirmation of representation[7]

12.8.1 An arbitrator must ensure that a party is not represented by a person who is not permitted to do so in terms of the LRA and the CCMA Rules.

12.8.2 If necessary a ruling should be made whether or not a party may be represented by a particular person.

12.8.3 If there is an application for legal representation to be allowed,the application must be considered and a ruling must be made whether or not to permit legal representation.

12.9 Opening statements

12.9.1 The arbitrator should require the parties to make opening statements. There is no hard and fast rule, but generally the applicant should be requested to make its opening stament first.

12.9.2 The opening statement should contain –

- a description of the nature of the dispute;
- a statement of that party's position and the relief sought;
- an outline of the law and company rules pertaining to the dispute;
- a statement of the facts that are common cause;
- a statement indicating what facts are in dispute; and
- an outline of the evidence to be presented by that party.

12.10 Dealing with preliminary issues

12.10.1 Preliminary issues include applications for condonation, objections to jurisdiction, applications for discovery of documents, applications for recusal of the arbitrator, etc.

12.10.2 Before, during or immediately after the opening statement the arbitrator should -

- enquire from the parties whether they have any preliminary issues to raise;
- raise any preliminary concerns that the arbitrator might have as a result of reading the referral forms or other documents in the file or as a result of hearing the opening statements;
- explain the preliminary point to any party requesting clarification;
- if necessary allow the parties an opportunity to lead evidence relating to any preliminary point raised; and
- invite each party to make submissions in respect of the preliminary point.

12.10.3 Whether or not it is raised by either party as a preliminary issue, the arbitrator must ensure that the employer party has been properly identified, i.e. whether it is a natural person, partnership, close corporation, company, or other legal person. If necessary, the arbitratior should correct the citation.

12.10.4 The arbitrator must decide the preliminary point before proceeding with the arbitration, unless evidence is required to deal with the point and it is practical to hear evidence on the merits at the same time.

12.10.5 Unless it is a complex issue the arbitrator must make a ruling immediately, but need not give reasons for the ruling at the same time, provided that the reasons for the ruling are contained in the final award.If the preliminary point resolves the dispute, the arbitrator must issue an award reflecting the reason for upholding the point and the relevant facts upon which the decision was based.

12.11 Narrowing the issues in dispute

12.11.1 After the opening statements the arbitrator should assist the parties to narrow the issues in dispute by facilitating an agreement relating to the factual and legal issues that are common cause and the factual and legal issues that the arbitrator is required to decide.

12.11.2 Whether it is necessary to narrow the issues during the arbitration would depend on the circumstances. In relatively simple cases the issues in dispute may be so obvious that it may not be necessary to engage in such process. The issues may already have been narrowed as part of the conciliation process or at a pre-arbitration conference.

12.11.3 In dismissal cases the arbitrator should at this stage require the employee party to -

- state whether the substantive fairness or the procedural fairness of the dismissal, or both, are being challenged;

- indicate on what grounds it is alleged that the employer party's reason for the dismissal was unfair;

- specify whether it is admitted or denied that a rule or standard was contravened, whether the rule or standard was a valid or reasonable rule or standard, whether the employee party was aware or could reasonably have been expected to be aware of the rule or standard, whether the rule or standard has been consistently applied and whether dismissal was an appropriate sanction for the contravention of the rule or standard;[8]

- indicate the grounds on which it is alleged that the procedure was unfair;

- specify whether the employee party was notified of the allegations in a form and language that the employee party understood, whether the employee party was allowed an opportunity to state a case in response to the allegations,

whether the employee party was allowed a reasonable time to prepare such response and whether the employee party was permitted to have the assistance of a shop steward or a fellow employee.[9]

12.11.4 The employer party should be required to indicate the extent to which it admits or denies the employee party's case.

12.11.5 Each party should be given an opportunity to ask questions to clarify any version given and to respond to it.

12.11.6 Each party should be required to indicate -

- what documents they will use in support of their case;
- the witnesses they intend calling and what the evidence of the witnesses will be; and
- the legal principles and documents that they will rely on.

12.11.7 If any party intends relying on documentary evidence the arbitrator should establish what the evidentiary status of the documents is. If the authenticity or the correctness of the contents of the documents is in dispute the arbitrator should alert the party wishing to rely on the documentary evidence to call witnesses whose evidence will prove that the documents are authentic and that the contents thereof are correct.

12.11.8 At the conclusion of this stage the arbitrator should secure and record an agreement between the parties that identifies -

- the issues that are common cause;
- the issues that are in dispute;
- the documents, the authenticity and correctness of which are admitted; and
- the issues that the arbitrator is required to decide in order to resolve the dispute.

12.12 Hearing of evidence

12.12.1 The purpose of this stage is to hear the evidence of the witnesses and to give each party the opportunity to question the witnesses and, where applicable, to challenge their testimony.

12.12.2 Starting with the party who bears the onus, each party must be given an opportunity to call as many witnesses as is necessary to give oral evidence about the disputed issues.

12.12.3 At this stage all witnesses should be excluded from the hearing room except the individual employee party/parties and the employer party and their representatives,unless the party specifically wants the witness to be present.

12.12.4 The arbitrator must require the witnesses to take the prescribed oath or, if there is an objection to taking the oath, to affirm that the evidence will be the truth.

12.12.5 Each witness must be advised of the questioning process.

12.12.6 In an inquisitorial arbitration the process of questioning a witness should usually entail the following-

- The arbitrator should question the witness to obtain the evidence of the witness that is relevant to the dispute;
- The party who called the witness may thereafter question the witness to obtain additional evidence;
- The other party may thereafter cross-examine the witness;
- The party who called the witness may thereafter re-examine the witness, i.e. ask the witness additional questions in order to clarify evidence given during cross-examination;
- The arbitrator may at any stage question the witness to clarify evidence or to determine the probabilities of the different versions in the case and to assess the reliability of the evidence.

12.12.7 In an adversarial arbitration the process of questioning a witness should usually entail the following-

- The party who called the witness should question the witness to obtain evidence of the version in support of which the witness is testifying;
- The other party may then cross-examine the witness;
- The party who called the witness may thereafter re-examine the witness, i.e. ask the witness additional questions in order to clarify evidence given during cross-examination;
- The arbitrator may at any stage question the witness to clarify evidence or even to determine the probabilities of the different versions in the case and to assess the reliability of the evidence.

12.12.8 Where the arbitrator decides to question a witness to clarify evidence or to determine the probabilities of the different versions in

the case and to assess the reliability of the evidence, the parties must be permitted to ask questions arising from the questioning by the arbitrator.

12.12.9 The party who called the witness should not be allowed to ask leading questions or to cross-examine the witness.

12.12.10 The arbitrator may disallow questions or evidence not relevant to the issues in dispute.

12.12.11 Whether an inquisitorial or adversarial process is followed, the party calling the witness may not cross-examine the witness, unless the witness has been declared a hostile witness.

12.12.12 Where parties are not experienced, or where fairness requires it, an arbitrator should indicate to a party that it has not presented evidence on an issue in dispute.

12.12.13 The arbitrator should likewise remind a party to put its version to opposing witnesses and to dispute aspects of the evidence of an opposing witness that are incorrect.

12.12.14 The arbitrator must –

- ensure that the testimony given by witnesses is recorded digitally; and

- take notes of the evidence and keep such notes in the CCMA file.

12.13 Closing of case

12.13.1 At the conclusion of a party's evidence, the arbitrator should ask the party to confirm that no further witnesses are to be called and that the party is closing its case.

12.13. 2 An order for absolution from the instance at the conclusion of the evidence of the party who first led evidence is not one which an arbitrator can make.[10]The other party may however close its case without calling witnesses.This would only happen in rare and exceptional cases and in such instances such party should be advised of the risk that the version of the other party may be accepted if no other evidence is led.

12.14 Concluding arguments

12.14.1 Once both parties have closed their cases, they should be given an opportunity to make closing submissions and advised to address the arbitrator on the following issues –

- what facts they rely on in support of their cases;
- why those facts should be believed or why those facts should be accepted as more probable;
- the conclusions to be drawn from the proven facts and whether such facts proved, for example, that an unfair dismissal or an unfair labour practice occurred;
- the legal principles and authority that they rely on and how that should be applied to the facts; and
- the relief sought or proposed.

12.14.2 In complex cases, and if it is requested by the parties, the arbitrator may allow the parties to submit written arguments, provided that the parties may not be allowed more than seven days to file such written arguments.

12.14.3 If during the process of making an award, the arbitrator considers relying on an argument not raised during the proceedings, the arbitrator should call upon the parties to make oral or written submissions before making an award based on such argument.

12.15 **Closing of arbitration process**

12.15.1 The arbitrator should close the arbitration by explaining that the award will be issued within 14 days.

12.15.2 The arbitrator should complete the outcome report.

12.15.3 If it is already apparent during the hearing that the arbitrator is to apply for an extension of the 14 day period, the views of the parties on whether such extension should be granted, should be recorded on the outcome report.

12.15.4 The addresses to which the parties wish the award to be sent should be clarified and recorded on the outcome report if it is different from the addresses on the CCMA system.

12.15.5 The arbitrator should number the pages containing the arbitrator's notes and place such notes in the CCMA file.

12.15.6 The documentary exhibits should be numbered and placed in the CCMA file in the correct sequence.

12.15.7 The arbitrator should further ensure that the recording is handed to the CCMA and complete the recordings register by indicating the date of the hearing and the case number and by signing the entry.

12.16 Award

12.16.1 The award must be handed to the CCMA within 10 days of the last day of the arbitration hearing or within any extended period approved by the Director.[11]

12.16.2 In a case where the parties were permitted to file written argument, the last day of the arbitration hearing is the day on which the written argument is received, provided that such day may not be later than seven days from the date on which the last evidence was heard.

12.16.3 When parties are permitted to file written argument the arbitrator must, within 24 hours of the last day on which evidence was heard, bring it to the attention of the relevant CCMA manager so that the CCMA system may be updated to reflect when the 14 day period for issuing the award would expire.

12.16.4 Awards are further dealt with in Chapter 14.

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

12.17.1 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 becomes unable to conclude the arbitration.The consent of the parties is not required.

12.17.2 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.

12.17.3 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.[12]

12.17.4 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.

12.17.5 Once an award was issued the CCMA has no power to appoint another commissioner to arbitrate unless the award is set aside on review.

12.18 Arbitrations *in camera*

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

12.18.2 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.

12.18.3 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,

12.18.4 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.

12.18.5 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.

12.18.6 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.

12.18.7 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 arbitraton 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.

12.18.8 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 approach[13]-

- 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 anomity 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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[1] Sections 136 and 191.
[2] Section138 (1).
[3] Clause 3.1 of the Code of Conduct for Commissioners states that "Commissioners should disclose any interest or relationship that is likely to affect their impartiality or which might create a perception of impartiality".
[4] Section 138 (2).
[5] A number of these techniques, including narrowing of the issues, are dealt with in paragraphs hereunder.
[6] 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) at para 33.
[7] See Chapter 4.
[8] See Item 7 of the Code of Good Practice: Dismissal.
[9] See Item 4 (1) of the Code of Good Practice: Dismissal.
[10] In the civil courts if a party who made allegations is not able to prove them, the other party is absolved from proving the contrary. This is known as absolution from the instance. It does not bring a case finally to an end as the litigation may be recommenced once further or better evidence becomes available. The CCMA is obliged to determine the dispute. An arbitration award is final in the sense that an award may only be taken on review.
[11] See paragraph 14.18.
[12] See *Sondolo IT (Pty) Ltd v Howes & others* [2009] 5 BLLR 499 (LC).
[13] *NUM & others v Deelkraal Gold Mining Co Ltd* [1994] 7 BLLR 97 (IC).

Chapter 13 : Admissibility and evaluation of evidence

Contents

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

13.1.1 In terms of section 138 of the LRA, a party to the dispute may 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[1].

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: 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 agreement.

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 The witness should then proceed to make a statement. This is called ‘evidence in chief’. Once the witness has completed the statement,

the other party has the right to cross-examine the witness. Once this is completed the witness may be re-examined with a view to clarify the responses to questions under cross-examination.

13.5.7 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.

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13.5.8 Opinion evidence is not admissible unless given by an expert, in which event, it should first be established that the witness is in fact an expert.

13.5.9 Character evidence is also not admissible, unless a witness places his/her character in issue by leading evidence regarding his/her reputation.

13.5.10 A witness is not entitled to give evidence by reading a prepared statement, unless the parties have agreed to this.

13.5.11 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. 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 It is not the CCMA's role to ensure that a party's witnesses are present in the arbitration. A commissioner has the power to subpoena a person to appear at the arbitration hearing to be questioned and/or to produce a book or document which is relevant to the dispute.

13.6.2 The procedure for subpoenaing a witness is that the party who wishes to subpoena a witness must apply in writing indicating why the evidence of the witness is relevant to the dispute. Once the subpoenas are authorised by the CSC or his/her delegate the party who requested it should serve it on the witness in a manner prescribed by the rules.

13.6.3 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 are relevant, need to be proved 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 The is no rule requiring that parties should give each other notice of intention to call an expert together with a summary of the evidence to be given by such expert, but if there is an opportunity to do so the parties should be encouraged to do so as it may shorten the proceedings.

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.

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 factors-

- Probabilities
- Reliability
- Credibilty

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. 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 Credibility relates to the truthfulness of a witness and includes consideration of the following-

- The openess and performance of the witness and the willingness to consider alternatives without being stubborn or easily swayed (demeanour);
- Any indication of bias or bad faith;
- Any contradictions or inconsistencies in the evidence, including with other proven acts or statements made outside the hearing;
- The probability or improbability of particular aspects of the version of the witness given at the arbitration;
- The probability or improbabilty of the allegations of the witness when weighed against the general or inherent probabilitites;

- Whether the witness had the benefit of testifying in his mother tongue;

- The sophistication and intelligence of the witness.

13.14.6 Reliabilty involves the following considerations-

- The extent of the witness' first hand knowledge of the events;

- Any interest or bias the witness may have;

- Any contractions and inconsistencies;

- Corroboration by other witnesses;

- The probability or improbabilty of the allegations of the witness when weighed against the general or inherent probabilitites;

- Whether the witness had the benefit of testifying in his mother tongue;

- The sophistication and intelligence of the witness.

13.14.7 These considerations must be dealt with in the arbitrator's award.

Chapter 14 : Awards

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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 proceedings.[1]

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 arbitrator.[2]

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 proceedings.[3]

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 authority.[4]

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 order.[5]

14.1.8 The award must be clear as vague awards are not enforceable.[6]

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.

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/herself.[7] 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?[8]

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 procedure.[9]

14.3.2 When arbitrators decide whether a dismissal was procedurally fair, they must have regard to item 4 of the Code of Good Practice: Dismissal ("the Code"). If there is a workplace disciplinary procedure in place, an arbitrator must have regard to that procedure. The arbitrator's approach to procedural fairness will be determined by the existence of a workplace procedure and the legal status of that procedure.

14.3.3 If there is no workplace disciplinary procedure, the Code must be applied subject to any departures that may be justified by the circumstances.

14.3.4 If there is a workplace disciplinary procedure, its legal status will affect the approach to be adopted by an arbitrator assessing the procedural fairness of a dismissal. There are three categories: those that are contained in a collective agreement; those that are contractually binding; and those that are unilaterally established by the employer. Each category attracts a different approach.

Absence of workplace procedures

14.3.5 In the absence of standards of procedural fairness established by workplace disciplinary procedures, the arbitrator must apply item 4 of the Code. The Code contemplates an investigation into the misconduct that includes an inquiry which does not have to be a formal enquiry.

The general approach-

14.3.6 In the absence of workplace disciplinary procedures, the Code does not contemplate a criminal justice model incorporating formal charge sheets, formal procedures for the leading and cross-examination of witnesses, formal rules of evidence, legal representation and independent decision making. The Code contemplates a flexible, less onerous approach. The fairness of an enquiry conducted by an employer without workplace procedures must be tested against the requirements for procedural fairness contained in item 4. In the absence of workplace procedures, it is a reviewable irregularity to test procedural fairness against any standard other than the one contained in item 4.

14.3.7 What is required for a fair enquiry under item 4 is the following-

- The employer must notify the employee of the allegations of misconduct using a form and language that the employee can reasonably understand. That means that the notice must be clear and comprehensible to enable the employee to respond to it. It need not assume the form or style of a criminal indictment;

- The employee should be allowed a reasonable time to prepare a response to the allegations;

- The employee should be entitled to the assistance of a trade union representative or fellow employee in preparing a response;

- The employee should be given the opportunity to state a case in response to the allegations. This can be done in writing or in a meeting. There is no requirement that the inquiry should take the form of a formal enquiry, i.e. a hearing;

- The employer must communicate the decision taken, preferably in writing, and furnish the employee with reasons for the decision;

- If the employee is dismissed, the employer must remind the employee of the right to refer a dispute to the CCMA, a council with jurisdiction or in terms of a dispute resolution procedure in a collective agreement.

14.3.8 The Code permits justifiable departures from these norms and, in exceptional circumstances, permits dispensing with pre-dismissal procedures altogether.

Notification of allegations-

14.3.9 The Code contemplates a simple informal process of notification. As long as the allegations are clear and capable of being understood, the requirement of fairness is satisfied. The notification may be oral or in writing. The objective of this requirement is to ensure that the employee is capable of stating a case in response. The fairness of the notification should be tested against that objective.

Reasonable time-

14.3.10 The Code requires that the employer gives the employee a reasonable time to prepare a response. The primary factor in determining reasonableness is the time needed to prepare a case in response. That will turn on the complexity of the allegations and the nature of the factual issues that need to be canvassed. Giving less than a day to prepare a response will in most cases not be reasonable.

Assistance of a representative-

14.3.11 The Code provides that an employee is entitled to the assistance of a trade union representative or a fellow employee in stating a case. A trade union representative is an employee entitled to represent

employees in the workplace. It does not include a trade union official or a legal practitioner.

Opportunity to state a case-

14.3.12 There is no requirement to hold a hearing. The opportunity to state a case may take the form of written representations or a meeting in which the employee is given the opportunity to respond to the allegations. There is also no invariable rule that evidence be led in support of the allegations – only that the employee has an opportunity to state a case in response to the allegations. It all depends on the nature of the allegations. Sometimes it is necessary to confront one's accusers in order to properly state a case. In such cases it may be unfair for an employer not to permit an employee to hear the evidence and to question the witnesses.

14.3.13 If the employer holds a hearing, then the hearing should be conducted in a manner that properly permits the employee to state a case. Again the determining factor in assessing the fairness of the hearing is whether the employee was given a proper opportunity to do so.

14.3.14 The duty to give an employee an opportunity to state a case is not affected by who hears the case. Accordingly, it is not unfair for the employer to use the services of a third party, such as an attorney or an arbitrator, to conduct the hearing.

Departures from the Code-

14.3.15 The Code permits an employer to dispense with the procedures provided for in the Code in exceptional cases. These may include what have been termed "crisis zone" cases, where the employer acts to protect lives and property. Procedures might also be dispensed with in cases such as a refusal or failure to state a case or absence without leave or explanation. In these cases the employer may make a decision on the merits of the allegation without the employee having stated a case in response.

14.3.16 The Code also permits departures from the guidelines in the Code provided that they can be justified. Accordingly there may be circumstances that justify a departure from the norm, that the opportunity to state a case in response to an employer's allegation of misconduct should ordinarily precede any decision to dismiss. If an employer, after making a decision on the merits without affording the employee the opportunity to state a case, offers an employee an opportunity to state a case afterwards but before someone who was not involved in the first decision, and who is independent, impartial and authorised to make a fresh decision, a departure from the norm may be justified.[10]

Analysis of facts-

14.3.17 In determining procedural fairness in the absence of workplace disciplinary procedures, the analysis of the facts in the award should be organised along the following lines. Under each heading the relevant facts should be assembled and analysed-

- Was the employee notified of the allegations and, if so, was the notice given in a form and language that the employee could understand and was the notice sufficiently detailed to enable the employee to respond?

- Was sufficient time allowed to obtain the assistance of a trade union representative or a fellow employee and to prepare a response?

- Was the employee assisted by a trade union representative or fellow employee in stating a case and, if not, was the employee prevented from exercising the right of assistance?

- Was the employee given a proper opportunity to state a case?

- Was the employee given reasons for dismissal and advised of the right to refer a dispute to the CCMA?

- If there was a departure from any of the above, were there any exceptional circumstances justifying such departure and, if not, to what extent was the employee prejudiced?

Existence of workplace disciplinary procedures

Collective agreements-

14.3.18 The Code is not a substitute for a disciplinary code and procedure contained in a collective agreement.[11] If a disciplinary procedure is agreed in a collective agreement, the procedural fairness of a dismissal must be tested against the agreed procedure and not the Code. It is only if an agreed procedure is silent on an issue required by the Code that the Code plays any role.

14.3.19 When determining whether a disciplinary procedure conducted in terms of a collectively agreed procedure involves any procedural unfairness, the arbitrator should examine the actual procedure followed. Unless the actual procedure followed resulted in unfairness, the arbitrator should not make a finding of procedural unfairness in a dismissal case.[12]

14.3.20 A departure from the procedure contained in a collective agreement should constitute procedural unfairness. But not every instance of

procedural unfairness ought to give rise to an order of compensation. In deciding whether to award compensation or in determining the amount of compensation to be awarded, the arbitrator should consider the materiality of the breach and the prejudice to the employee.

Contractually binding procedures-

14.3.21 Agreed procedures not contained in a collective agreement do not have the same status as those contained in a collective agreement. It must be tested against the Code and any conflict should be decided in favour of the Code unless the employer can justify the departure. If the contract imposes a procedure more favourable to the employee than the one in the Code, the procedural fairness of a dismissal must be tested against the contractual procedure.

14.3.22 A departure from the agreed procedure should constitute procedural unfairness. But not every instance of procedural unfairness in these circumstances ought to give rise to an order of compensation. Like in the case of collective agreements, in deciding whether to award compensation and in determining the amount of compensation, the materiality of the breach and the prejudice to the employee should be considered.

Employer imposed procedures-

14.3.23 An employer imposed procedure must be tested against the Code and if the employer imposed procedure is less favourable to the employee, the Code takes precedence, unless the employer can justify the departure. If the employer's established procedure is more favourable to the employee than the procedure required by the Code, a departure from such established procedure should constitute procedural unfairness even though the procedure followed might satisfy the requirements of the Code. Deviation from established procedures would ordinarily constitute inconsistent treatment of employees and would for that reason be unfair. In deciding whether to award compensation and in determining the amount of compensation, the materiality of the deviation from the established procedure and the prejudice to the employee should be considered.

14.3.24 There may be circumstances justifying an amendment or adjustment of an established procedure, e.g. to meet a particular exigency or to address circumstances not contemplated in the procedure. If such changes can be justified, if it did not cause material prejudice to employees and if employees were notified of such changes in advance, a deviation from the previous procedure will not constitute procedural unfairness if the procedure followed was in accordance with the established procedure in place at the time when the disciplinary action was instituted.

Representation-

14.3.25 In cases where the Code is applicable, the employee has a right to be assisted by a trade union representative or a fellow employee. In other cases and where a workplace procedure provides for a right to representation when an employee is called upon to state a case in response to an allegation of misconduct, a disputed decision by an employer regarding representation should be evaluated in terms of that procedure. If an agreed or employer established procedure permits the right to legal representation or the right to representation by a union official or office-bearer this should be afforded.

14.3.26 Neither the LRA nor the Code recognises an automatic right to legal representation at disciplinary enquiries.Whether legal representation is indispensable to ensuring a procedurally fair hearing, is a discretion conferred upon the chairperson of a disciplinary enquiry.[13] The chairperson must exercise such discretion judiciously, having regard to all the circumstances of the particular case including -

- the nature of the allegations;
- the degree of the factual or legal complexity attendant upon considering the allegations;
- the potential seriousness of the consequences of an adverse finding;
- the availability of suitably qualified lawyers amongst the employer's staff;
- the nature of the prejudice to the employer should legal representation be permitted;
- whether there is a legally trained initiator; and
- any other factor relevant to the fairness of restricting the alleged transgressor to the kind of representation mentioned in the notice to attend the disciplinary enquiry.

14.3.27 Where a chairperson of a disciplinary enquiry exercised a discretion against allowing an employee to be legally represented at a disciplinary enquiry, an arbitrator should consider whether such discretion was fairly exercised.

Disciplinary action against trade union representatives, office-bearers or officials

14.3.28 If an employer intends to take disciplinary action against an employee who is a trade union representative or an employee who is an office-bearer or official of a trade union, the Code requires the employer to inform and consult with the union before doing so. Because the dismissal of such employees may be perceived as victimisation, the object of the consultation is to attempt to satisfy the union that the disciplinary action is not motivated by a desire to

victimise and, if there is no agreed procedure, that a procedure will be adopted that will be perceived by employees and the trade union as fair and objective.[14]

14.3.29 The norm applies to trade union representatives of recognised trade unions. The LRA defines a trade union representative as a member of a trade union elected to represent employees. A shop steward appointed by an unrecognised trade union and not elected to represent employees does not constitute a trade union representative. Accordingly, it is not a departure from the norm not to inform and consult in circumstances where disciplinary action is taken against a shop steward appointed by an unrecognised trade union.[15]

14.3.30 Departures from this requirement may constitute procedural unfairness. Such departures may, however, be justified if the trade union and the trade union representative were not prejudiced by the failure to inform and consult the trade union and if the employer had good reason for not doing so.[16] If there is no justification, the arbitrator must consider the extent of the prejudice suffered by the employee, in deciding whether to grant compensation and, if so, the amount thereof.

14.4 How to approach the substantive unfairness of a dismissal for misconduct.

14.4.1 Arbitrators are required to take the Code into account in determining the fairness of a dismissal for reasons relating to conduct. Item 7 of the Code provides guidelines for such dismissals. These guidelines impose constraints on the power of a commissioner to determine fairness.[17]

14.4.2 In determining whether a dismissal for misconduct is unfair, an arbitrator should, in terms of item 7, consider-

- whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

- if a rule or standard was contravened, whether or not –

  - the rule was a valid or reasonable rule or standard;
  - the employee was aware, or could reasonably be aware of the rule or standard;
  - the rule or standard has been consistently applied by the employer; and
  - dismissal was an appropriate sanction for the contravention of the rule or standard.

14.4.3 The consideration of each of the issues outlined in item 7 involves distinct factual enquiries that each arbitrator must ensure is

conducted. These factual enquiries themselves can often be broken down into more detailed factual enquiries. These factual enquiries are relevant when dealing with the narrowing of issues before a hearing, the receipt of evidence in a hearing and organising and assessing the evidence in an award.

Is there a rule?

14.4.4 Before an employee can be fairly dismissed for misconduct, there must be a contravention of a rule or standard. The existence of the rule is, therefore, the first and normally the easiest of the factual enquiries into substantive fairness.

14.4.5 The employer must identify the rule or standard that the employee is alleged to have contravened. The next step is to ascertain the existence of the rule or standard. Since many employers have disciplinary codes, the submission of a code that includes the rule or standard is normally sufficient proof of its existence.

14.4.6 If the employer has no disciplinary code, the existence of the rule may be proved by agreement or direct testimony of its existence by the employer or inferred from the contract of employment. The arbitrator may also rely on the arbitrator's expertise and take judicial notice of the existence of basic rules of conduct in all workplaces and special rules that may flow from the sector or the workplace itself.

14.4.7 Many of the universal rules flow from the duties inherent in every contract of employment, such as, the duties relating to performance (e.g. the duties to work, to keep time, to comply with lawful and reasonable instructions, to cooperate) or to good order (such as, the duties to cooperate or respect co-employees, not to assault or harass co-employees) or to trust (such as, the duties not to engage in dishonest conduct or to undermine the employer's business or reputation). These duties may arise from the duties imposed by legislation, such as, the Occupational Health and Safety Act. The special rules flow from the nature of the sector or workplace, such as, the stricter standards of compliance in workplaces with a high risk to safety or security.

14.4.8 An arbitrator may rely on a rule or standard not contained in a disciplinary code, if the code does not specifically exclude it as a ground for discipline and it is proved to be a rule or the arbitrator can infer it from the code, the contract, legislation or the practice in the sector or workplace.

14.4.9 If there is a dispute over the existence of the rule, the arbitrator may decide the dispute by taking judicial notice of the rule or decide it on

the evidence. That evidence must be summarised and analysed and decided on credibility or the balance of probabilities.

Was the employee aware of the rule?

14.4.10 The determination of this factual issue is often not disputed because the rule or standard is often contained in the employer's disciplinary code.

14.4.11 If the employee disputes knowledge of the disciplinary code or its contents, it will be necessary for the employer to demonstrate that the employer has made the code 'available to employees in a manner that is easily understood'.[18]

14.4.12 If there is no disciplinary code, the factual issue can be more complicated. Unless there is evidence concerning past practice of which the employee was aware, the proper approach to this question is whether the employee could reasonably be expected to have known of the rule or standard. This is a question that can be based on evidence or on the arbitrator's expertise. So, for example, in respect of the basic rules found in all workplaces, the employee is reasonably expected to be aware of them. "Some rules or standards may be so well established and known that it is not necessary to communicate them."[19]

Did the employee contravene the rule?

14.4.13 Whether a rule was contravened is a purely factual question. Unless the employee concedes contravening the rule, evidence must be led from both points of view. That evidence must be carefully summarised, analysed and determined on credibility or on the balance of probabilities.

14.4.14 There may be more than one factual question and each question needs to be treated separately with the different versions summarised, analysed and decided. So, for example, a contravention of the rule that an employee is required to carry out the lawful and reasonable instructions of the employer may require a factual enquiry into whether the instruction was given, whether the employee understood the instruction, whether the employee disobeyed the instruction and whether the employee has a justification for not obeying the instruction.

Is the rule or standard a valid or reasonable rule or standard?

14.4.15 It is the employer's responsibility to determine the rules and standards in the workplace.[20] It is not the arbitrator's role to second-guess those rules.[21] This does not constitute deference to the

employer but compliance with the Code.[22] The arbitrator's role is to determine the validity and reasonableness of the rule as part of the general enquiry into the fairness of the dismissal.

Validity-

14.4.16 The arbitrator must consider the rule or standard and determine whether it is lawful or contrary to public policy. So, for example, an instruction to perform work in contravention of a safety standard is not a lawful instruction.An instruction to perform work not contractually agreed, is not a lawful instruction. An instruction to seduce clients or not to give evidence against one's employer is contrary to public policy.

Reasonableness-

14.4.17 The Code requires only that the rule (or any instruction given under such a rule) is reasonable. It is not for the arbitrator to decide what the appropriate rules or standards should be – only that they are reasonable. Reasonableness admits of a range of possible views. Deciding whether a rule is reasonable may involve comparison with sectoral norms and the justification for the rule and its strictness. But the further the rule or standard departs from the general standards of conduct expected from an employee, the greater the need for the justification for that departure. For example, the Code considers that a single act of gross dishonesty constitutes a fair reason for dismissal. However, in certain occupations where there is a high degree of trust and a low capacity to monitor, the dishonesty need not be gross to constitute a fair basis for dismissal. The test is not so much the degree of dishonesty as the seriousness of that dishonesty for a tolerable continuation of the employment relationship given the nature of the occupation and the workplace. [23]

14.4.18 The enquiry into the reasonableness of the rule or standard is linked to the sanction prescribed for the breach of the rule or standard. They are inextricable and yet the Code and courts require them to be treated differently. The rule or standard is subject to the test of reasonableness, the sanction for breach of the rule is subject to the test of fairness, an individualised assessment that the arbitrator must make under the next step in the analysis, namely, whether the contravention is sufficiently serious to justify dismissal.

Is dismissal an appropriate sanction?

14.4.19 The test is whether the misconduct, on its own or cumulatively, renders the continued employment relationship intolerable. It is a value judgement but one that is guided by the employer's own rules and standards, norms in the sector, the Code, any guidelines

published by the CCMA, and the arbitrator's expertise. To the extent that these sources do not accord with emerging jurisprudence in the courts since 1995, that jurisprudence should also constitute a guide.

14.4.20 Determining whether the continued employment relationship is intolerable involves three enquiries: an enquiry into the gravity of the contravention of the rule; into the consistency of application of the rule and sanction; and into factors that may justify a different sanction.

Gravity of the contravention-

14.4.21 There are two enquiries implicated in assessing the gravity of the contravention. The first concerns the sanction prescribed for the misconduct. The second concerns any aggravating factors that may make the contravention more serious. The first is an enquiry into what sanction is prescribed for a contravention of the rule and the second is one into the circumstances of that contravention.

14.4.22 Dismissal as a sanction is normally reserved for serious misconduct. To the extent that a disciplinary code accords with what is generally regarded as serious misconduct, a sanction for such misconduct prescribed in a disciplinary code should generally be considered as appropriate (subject of course to the two further enquiries into consistency and mitigation). To the extent that a disciplinary code is more severe in its prescribed sanction than is generally the case, the employer must give reasons for prescribing the sanction for the contravention of the rule.[24] This is an enquiry into the reasons for the rule and standard and the sanction prescribed in the disciplinary code.

14.4.23 Because the Code promotes progressive discipline, it distinguishes between single acts of misconduct that may justify the sanction of dismissal and those that do so cumulatively. It identifies gross dishonesty, wilful damage to property, endangering the safety of others, assault and gross insubordination as examples of what may constitute serious misconduct that may justify dismissal as a result of a single contravention. The Courts have identified gross negligence and sexual harassment as serious misconduct. It is not a closed list and in some workplaces there may be more severe sanctions for contraventions of rules and standards.

14.4.24 The second enquiry is into the circumstances of the contravention. Those circumstances may aggravate the gravity of the contravention. Aggravating factors may include wilfulness, lack of remorse, not admitting to a blatant contravention of a rule, dishonesty in the disciplinary hearing, nature of the job and damage and loss to the employer. Aggravating circumstances may have the effect of justifying a more severe sanction than the one prescribed

in the disciplinary code or normally imposed by employers, either generally or in the sector, or may offset the personal circumstances which may otherwise have justified a different sanction.

Has the rule been consistently applied?

14.4.25 There are two kinds of consistency required of an employer in the application of a rule and a sanction – consistency over time and consistency as between employees charged with the same contravention.

14.4.26 If an employee leads evidence that another employee similarly placed was not dismissed for a contravention of the same rule, the employer must justify why the employee was treated differently. It may do so by producing the records contemplated in item 3(6) of the Code.

14.4.27 It is not inconsistent to treat employees charged with the same offence differently if there are mitigating or aggravating factors justifying the difference in treatment. In collective misconduct, it is permissible to treat those who play a leadership role more severely than those who are simply involved.[25]

Factors justifying a different sanction-

14.4.28 Although these factors are often referred to as mitigating factors, they are not. Dismissal is not a punishment. It is a decision based on the operational justification that continued employment is intolerable. It is a sensible operational response to risk management in the affected enterprise.[26] Accordingly, the factors that ought to be taken into account under this head must relate to that justification. They must weigh in favour of the continuation of employment rather than its termination. It goes to the probability that a further infraction may occur and the risk of damage that may be caused by such further infraction.

14.4.29 The Code identifies three different factors that may weigh in favour of continuing the employment relationship rather than terminating it: the employee's circumstances, the nature of the job and the circumstances of the contravention-

- *Employee circumstances*: This includes length of service, previous disciplinary record and personal circumstances.Long service, a clean disciplinary record and a disability caused by an accident at work would, for example, indicate a likelihood that continued employment is not intolerable and so weigh in favour of a less severe sanction. Personal circumstances should be work related such as the effect of dismissal on employees close to retirement. The personal or financial

consequences to an employee of being dismissed are not relevant to the question whether continued employment is intolerable but should nevertheless be borne in mind.

- *Nature of the job*: The nature of the job may be such that the damage or injury of any further infraction makes the risk of continued employment intolerable. So, for example, the risk for the employer would be greater should an air controller fall asleep than it would be in the case of a labourer.
- *Circumstances of the contravention*: The CCMA and the Courts have considered the following to constitute circumstances that may justify a different sanction: remorse, provocation, coercion, use of racist or insulting language, and lack of dishonesty. This is not a closed list.

14.5 How to approach remedies for unfair dismissals?

14.5.1 When a dismissal is found to be unfair the arbitrator must determine what remedy the LRA requires to be awarded and may order the employer to re-instate or re-employ the employee or to pay compensation to the employee depending on what remedy the LRA requires to be awarded.

14.5.2 Three scenarios are possible in the event of a finding that a dismissal was unfair. The finding might be that-

- the dismissal was only substantively unfair; or
- the dismissal was substantively as well as procedurally unfair; or
- the dismissal was only procedurally unfair.

14.5.3 An arbitrator who finds that a dismissal was substantively unfair must consider and make a finding -

- whether the LRA requires that the employer be ordered to re-instate or re-employ the employee;

  and, if so,

- whether the employer should re-instate the employee or whether the employer should re-employ the employee; and
- whether the re-instatement or re-employment, as the case may be, should operate with retrospective effect and, if so, the extent of the retrospectivity;

  or, if the LRA does not require re-instatement or re-employment,

- whether the employee should be awarded compensation and, if so, what the amount of the compensation should be.

14.5.4 In the event of a finding that the LRA does not require re-instatement or re-employment, the arbitrator does not have a discretion to still award such remedy. In such cases re-instatement or re-employment is not permitted by the LRA and may not be awarded.[27]

14.5.5 In the event of a finding that the LRA requires that re-instatement or re-employment be awarded, the arbitrator must further decide, depending on the kind of dismissal, whether to award re-instatement or re-employment.

14.5.6 An arbitrator who orders an employer to re-instate or re-employ an employee may not simultaneously or in addition award compensation to the employee.[28]

14.5.7 Re-instatement or re-employment are the primary remedies for substantively unfair dismissals and must be ordered unless -[29]

- the employee does not wish to be reinstated or re-employed;
- the circumstances surrounding a dismissal are such that a continued employment relationship would be intolerable;
- it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
- the dismissal is unfair only because the employer did not follow a fair procedure.

Employee not wishing to be re-instated or re-employed-

14.5.8 Before a finding is made that the employee does not wish to be reinstated or re-employed -

- The arbitrator must ensure that the employee has an opportunity to state during the arbitration whether re-instatement or re-employment is sought as a remedy;
- The arbitrator should explain fully what the remedies of reinstatement and re-employment entail and put options relating thereto to the employee insofar as those have become apparent in the course of the proceedings;
- Should the employee indicate that neither re-instatement nor re-employment is sought as a remedy, the arbitrator should inquire into whether the employee has adopted this position with full knowledge of the employee's rights and whether the employee

is certain that he or she does not wish to be re-instated or re-employed;

- Once the arbitrator is satisfied that the employee has made an informed decision not to seek re-instatement or re-employment, it is not appropriate for the arbitrator to further interrogate the employee's reason for not seeking this relief. It is not for arbitrators to overrule the election of the employee;

- It is however appropriate for the arbitrator to point out to the employee that the decision not to seek reinstatement or re-employment may affect the amount of compensation to be awarded;

- It must be clear from the evidence that the employee does not wish to be re-instated or re-employed and the arbitration award must reflect the employee's reasons for not wanting to return to work with his or her employer, if such reasons were supplied.

The circumstances surrounding a dismissal are such that a continued employment relationship would be intolerable-

14.5.9 An employer who alleges that a continued employment relationship would be intolerable must present evidence during the arbitration that establishes this on a balance of probabilities. The evidence must establish that there are no reasonable prospects of a good working relationship being restored.

14.5.10 In deciding whether or not the circumstances are such that a continued employment relationship would be intolerable the following should, *inter alia,* be considered -

- Whether the conduct of the employee prior to or after the dismissal, including the employee's conduct during the disciplinary enquiry or the arbitration has the result that ordering the employee's re-instatement or re-employment would cause significant disruption in the workplace. For example, it may be intolerable to re-instate or re-employ into a position of trust, an employee who has been found to have been dishonest in the arbitration proceedings. Another example is where the dismissal was unfair merely because the employer was inconsistent, but the employee committed misconduct justifying dismissal;

- Whether the evidence established that co-employees can no longer work with the employee who was unfairly dismissed;

- Whether the evidence established that there are no reasonable prospects of a good working relationship being restored.

It is not reasonably practicable for the employer to re-instate or re-employ the employee-

14.5.11 In deciding whether it is reasonably practicable for the employer to reinstate or re-employ the employee the following should be considered -

- This criterion relates to factors other than the employment relationship which would render re-instatement or re-employment an inappropriate remedy;
- The test is whether the employer proved that re-instatement or re-employment is not feasible or that it would cause a disproportionate level of disruption or place a disproportionate financial burden on the employer;
- Should the employer, for example, prove that the dismissed employee would in any event have been dismissed for operational reasons during a retrenchment exercise that occurred after the dismissal for misconduct, that may constitute a reason for not ordering re-instatement or re-employment;
- The fact that another employee has been appointed in the place of the unfairly dismissed employee is not in itself a reason to deny re-instatement as the re-instatement of the unfairly dismissed employee will constitute a ground for terminating the employment of the replacement for operational reasons;
- If re-instatement or re-employment into the previous position held by the employee is not practicable, the arbitrator should consider ordering reinstatement or re-employment in reasonably suitable alternative work and should inquire from the employer and the employee what is possible in the circumstances of a particular case. The onus to prove that a particular remedy is not reasonably practicable rests on the employer.

The dismissal was found to be only procedurally unfair-

14.5.12 It is not permissible for an arbitrator to award re-instatement or re-employment if the dismissal was found to be only procedurally unfair.

The difference between re-instatement and re-employment

14.5.13 When an employee is re-instated on the same terms and conditions that governed the employee's employment immediately prior to the dismissal, such employee is placed in the position that the

employee would have been had it not been for the dismissal, i.e. there is no interruption of service and the employee is entitled to be placed in the same position and to receive the same remuneration with effect from the effective date of re-instatement. General changes in terms and conditions of employment introduced between the date of dismissal and the order of re-instatement, such as, a general increase in remuneration, would apply to such employee.

14.5.14 In exceptional cases the circumstances may be such that it is appropriate to order re-instatement into a different position and on different terms and conditions of employment, e.g. where the employee was dismissed for operational reasons, poor work performance or incapacity and a finding is made that it was unfair not to place the employee in a different position with a change in remuneration as an alternative to dismissal. In such cases there would also not be any interruption in service and the employee would be entitled to the remuneration applicable to the alternative position from the effective date of re-instatement. General changes to terms and conditions, such as, a general increase in remuneration, would apply to such employee.

14.5.15 Re-employment means that the employment recommences from the effective date of re-employment. Like in the case of re-instatement, re-employment may, depending on the circumstances, be ordered into the same position or into a different position or on the same or different terms and conditions of employment. The difference is that in the case of re-employment the employee's service will only commence on the effective date of re-employment.[30] In applying a last-in, first-out selection criterion in future retrenchment exercises, it would not be unfair if only the service from the effective date of re-employment is taken into account. Furthermore, if the break between the date of dismissal and the effective date of re-employment is longer than twelve months, the service prior to the dismissal will not be taken into account in calculating severance pay should the employee later be dismissed for operational reasons.[31]

14.5.16 Ordering re-employment would be appropriate in a case of a dismissal of the nature referred to in section 186 (1) (d) of the LRA, i.e. where the employer dismissed a number of employees for the same or similar reasons and re-employed one or more of them but refused to re-employ another. It might also be appropriate in cases where a failure to renew a fixed term contract constituted a dismissal envisaged by section 186 (1) (b) of the LRA. In such cases it is the failure to re-employ that constituted the dismissal and for that reason it is appropriate to award re-employment as a remedy. In respect of most, if not all other unfair dismissals, re-instatement must be awarded unless one of the exceptions referred

to in section 193 (2) apply. If none of the exceptions apply it does not make sense for an arbitrator to find that the employment of an employee should not have been terminated and nevertheless award relief which upholds the termination of employment.

What must be specified in the award when awarding re-instatement or re-employment?

14.5.17 Arbitrators must specify in the award –

- whether the re-instatement or re-employment is in the same position and on the same terms and conditions that governed the employment relationship prior to dismissal or, if it is in a different position or on different terms and conditions of employment, in what position and on what terms and conditions of employment.
- the date from which re-instatement or re-employment is effective;[32]
- the quantum of the back pay that became due as a result of any retrospective operation of re-instatement or re-employment from the effective date of such re-instatement or re-employment to the date of the arbitration award;
- the period within which the back pay is to be paid; and
- the period within which the employee is to tender his/her service to the employer.

Relevant considerations regarding re-instatement and re-employment

14.5.18 An arbitrator may make an award of re-instatement or re-employment effective from the date of dismissal or any subsequent date.

14.5.19 An award of re-instatement may be made effective from a date which is more than twelve months prior to the date of the award but not earlier than the date of dismissal.[33]

14.5.20 If an arbitrator elects to order that the effective date of re-instatement or re-employment is later than the date of dismissal, the employee will not be entitled to back pay in respect of the period between the date of the dismissal and the effective date of the re-instatement or re-employment. This may be appropriate when the employee has unduly delayed the commencement or the finalisation of the arbitration or if the employee was to some extent to blame for the dismissal.

14.5.21 Where appropriate, arbitrators may order the employee to be reinstated or re-employed subject to some form of sanction such as a warning. If this is done, commissioners should specify the date from and until when the relevant sanction is effective.

Compensation for substantively unfair dismissals

14.5.22 The amount of compensation awarded for a substantively unfair dismissal must be just and equitable taking into account all the relevant circumstances of the case, but may not be more than an amount that is the equivalent of 12 months of the employee's remuneration as at the time of the dismissal.[34]

14.5.23 Guidance on the exercise of the discretion to award compensation must be sought in the purposes of the LRA and the broader constitutional context within which it is situated. The amount of compensation must be determined with regard to the circumstances of both employer and employee. An employee is not necessarily entitled to the full extent of his or her losses as a result of the unfair dismissal. An employee is also not necessarily entitled to any compensation. [35]

14.5.24 In determining an appropriate amount of compensation an arbitrator should consider the following -

- the remuneration and benefits that the employee received at the time of the dismissal;
- the time that elapsed since the dismissal;
- whether the employee secured alternative employment and, if so, when and at what rate of remuneration;
- whether the employee made reasonable attempts to mitigate his or her losses including whether the employee made reasonable efforts to find alternative employment;
- the patrimonial (financial) loss suffered by the employee; while financial loss is a relevant factor in determining compensation, the absence of patrimonial loss does not prevent an award of compensation;[36]
- the employee's prospects of future employment; the employee's chances of finding future employment would be affected by factors such as his or her age, the number of job opportunities available in his or her field and the employee's experience, level of education and academic qualifications;
- whether the resolution of the dispute was unreasonably delayed by the employee or the employee's representative; this may be taken into consideration despite the fact that condonation has been granted for a late referral.
- whether the dismissal was both substantively and procedurally unfair;

- the extent of the unfairness of the dismissal; this involves considering the extent to which the employer transgressed the requirements for a fair dismissal. For example, the amount of compensation would be increased if the employer had no reason for dismissing the employee, as opposed to an employee committing some misconduct for which dismissal was not a fair sanction;

- payments received by the employee from the employer, other than amounts due in terms of any law, collective agreement or the contract of employment; the amount of compensation may not, for example, be reduced by what an employer has paid the employee as notice pay, or severance pay or amounts the employee has received from the Unemployment Insurance Fund;

- whether the employee unreasonably refused an offer of reinstatement or re-employment; in general employers should not be penalised where they have made attempts to correct unfairness in dismissal by way of re-instatement or re-employment. However, an employee may refuse offers of re-instatement or re-employment and be entitled to full compensation where the relevant offer is not made in good faith or the trust relationship between the employee and the employer cannot be restored due to the employer's conduct;[37]

- whether the employee unreasonably refused other attempts by the employer to make substantial redress for the unfair dismissal such as securing employment for the employee with another employer or offers of payment;

- whether the conduct leading to the employee's dismissal caused the employer loss and the extent of that loss; and

- the employer's financial position; the purpose of compensation is generally not to punish employers and an appropriate amount of compensation must be determined with reference to the situation of both the employer and the employee. Thus the amount of compensation might be reduced if the effect of a larger amount would be to prejudice the employer more than it would remedy the unfairness perpetrated against the employee. In that regard commissioners should consider whether it might not be appropriate to order compensation to be paid in instalments as opposed to one lump sum.

14.5.25 The onus is on the parties to produce suitable evidence of the factors relevant to compensation that are favourable to them. Mere allegations are not sufficient.

Compensation for procedurally unfair dismissals

14.5.26 Particular considerations arise where a dismissal is found to be only procedurally unfair. In such cases compensation takes the form of a

solatium for the loss of the right to a fair pre-dismissal procedure. It is punitive to the employer to the extent that the employer who has breached the right must pay a penalty for doing so.[38]

14.5.27 Determining the appropriate amount of compensation in cases where there is procedural unfairness only therefore requires an assessment of the extent of the procedural unfairness together with the anxiety or hurt experienced by the employee in light of that unfairness.In that regard commissioners might consider how the employer conducted itself prior to, and in the course of, dismissing the employee. The amount of compensation might, for example, be increased where the employer infringes the employee's fundamental rights by treating the employee in a humiliating, insulting or inconsiderate manner in effecting the dismissal.

14.5.28 The nature and the extent of the deviation from the procedural requirements must be considered in deciding whether to award compensation and, if so, how much compensation should be awarded. The minor the deviation from the procedural requirements the more justifiable would a refusal to grant compensation be. The more serious the deviation, the stronger the case is for awarding compensation.[39]

14.5.29 As the determination of compensation for procedural unfairness is not based on the employee's actual financial loss it is not relevant whether the employee secured alternative employment or mitigated the financial loss caused by the dismissal in any other way.

14.5.30 Factors such as the employee's length of service might be relevant in determining the extent of the anxiety or hurt suffered by the employee as longer-serving employees are entitled to expect greater consideration from their employers.

14.5.31 An arbitrator who finds that a dismissal is procedurally unfair may charge the employer an arbitration fee. This may be done irrespective of the finding on substantive fairness.[40]

Amounts payable in terms of section 74 of the BCEA

14.5.32 Section 74 of the BCEA gives CCMA arbitrators the jurisdiction to determine, in conjunction with unfair dismissal disputes and severance pay disputes, claims that the employer owes the employee amounts in terms of the BCEA. Those amounts would include claims for unpaid salary or wages, overtime or leave pay.

14.5.33 An arbitrator in an arbitration about unfair dismissal or entitlement to severance pay, only has jurisdiction to make a determination in respect of an amount owing in terms of the BCEA if:

- the claim for the amount owing in terms of the BCEA has been referred in the 7.11 referral form;[41]

- the amount has not been owing to the employee for longer than a year prior to the date of dismissal; and
- no compliance order has been issued and no other legal proceedings have been instituted to recover the amount that is allegedly due, owing and payable.

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.* These facts are specific to the conduct of the arbitration. It should deal 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 super market 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.

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 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.

14.10.4 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.

14.10.5 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 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.

14.11.3 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.

- *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.

14.11.4 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.

14.11.5 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.

14.11.6 Where relief is awarded the reasons for awarding the relief including the extent of the relief should be set out.

14.11.7 Where applicable it should be explained how back pay or compensation was calculated.

14.11.8 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.

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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.

14.13 How should an award for reinstatement be worded?

14.13.1 A reinstatement award should be worded as follows-

(a) The employer, ABC (Pty) Ltd is ordered to reinstate 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 reinstatement 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 reinstatement, 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.

14.14 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 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

14.17 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[42]. 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.[43]

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. Extensions of the time period can only be granted before the expiry of the 14 day period.

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.

14.19 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 by 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 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.

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[1] 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 arbitrator.

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

[4] *Le Roux v CCMA & others* [2000] 6 BLLR 680 (LC) at 687-668.

[5] Section138 (9). In *Superstar Herbs v Director CCMA & others* [1999] 1 BLLR 58 (LC), the court held that an award is not appropriate if there has been a failure of justice or unfair hearing. An award to the effect that there was an agreement that bargaining councils will investigate demarcation disputes, was held not to be within the CCMA's powers in *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 reinstatement award must be quantified.

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

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

[9] Section188.

[10] *Semenya v CCMA & others* (2006) 27 *ILJ* 1686 (LAC).

[11] See item 1 of the Code.

[12] *Highveld District Council v CCMA & others* (2003) 24 *ILJ* 517 (LAC): [2002] BLLR] 1158 (LAC) at para 15.

[13] *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* [2005] 2 BLLR 173 (SCA); *Majola v MEC, Department of Public Works, Northern Province & others* [2004] 1 BLLR 54 (LC) at para [1].

[14] *POPCRU obo Masemola &others v Minister of Correctional Services* (2010) 31 ILJ 412 (LC)

[15] *BIAWU & another v Mutual and Federal Insurance Co Ltd* [2002] 7 BLLR 609 (LC).

[16] See however *NCBAWU v Masinga and others* [2000] BLLR 171 (LC). In that case the question of prejudice was emphasized. The decision does not prevent arbitrators from also considering whether there was justification for departing from the Code.

[17] *Sidumo & others v Rustenberg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at para 175.

[18] Item 3 (1) of the Code.

[19] Item 3 (1) of the Code.

[20] *County Fair Foods (Pty) Ltd v CCMA and others* [1999] 11 BLLR 1117 (LAC) at paragraph 11 confirmed in *Sidumo & others v Rustenberg Platinum Mines Ltd & others (supra)* at paragraphs 67 and 176.

[21] *Sidumo & others v Rustenberg Platinum Mines Ltd & others (supra)* at paragraphs 67 and 181.

[22] *Sidumo & others v Rustenberg Platinum Mines Ltd & others (supra)* at paragraph 183.

[23] *Metro Cash & Carry Ltd v Tshela* [1997] 1 BLLR 35 (LAC).

[24] *Sidumo & others v Rustenberg Platinum Mines Ltd & others (supra)* at paragraph 181.

[25] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

[26] *De Beers Consolidated Mines Ltd v CCMA & others* [2000] BLLR 995 (LAC) at para 22.

[27] *Volkswagen SA (Pty) Ltd v Brand NO & others* [2001] 5 BLLR 558 (LC).
[28] *Equity Aviation Services (Pty) Ltd v CCMA & others* (2008) 29 ILJ 2507 (CC); [2008] 12 BLLR 1129 (CC).
[29] Section 193 (2).
[30] Grogan *Workplace Law* at 120. See also the minority judgment in the Namibian case of *Transnamib Holdings Ltd v Engelbrecht* (2007) 28 ILJ 1394 (Nm). The case dealt with Namibian labour legislation and insofar as a different view was expressed by the majority, it is not binding authority.
[31] Section 41(2) read with section 84(1) of the BCEA.
[32] This cannot be earlier than the date of dismissal. See *National Union of Metalworkers of SA & Others v Fibre Flair CC t/a Kango Canopies* (2000) 21 *ILJ* 1079 (LAC) at 1080H -1081A.
[33] *Equity Aviation Services (Pty) Ltd v CCMA & others (supra).*
[34] Section 194 (1).
[35] *Kemp t/a Centralmed v M.B. Rawlins* (Unreported case, Case No JA11/06 (LAC)).
[36] *HM Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes* (2002) 23 *ILJ* 278 (LAC).
[37] *Kemp t/a Centralmed v M.B. Rawlins* (supra).
[38] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 *ILJ* 89 (LAC).
[39] *Kemp t/a Centralmed v M.B. Rawlins* (supra).
[40] Section 140 (2).
[41] *Douglas and others v Gauteng MEC of Health* [2008] 5 BLLR 401(LC) at para 38.
[42] Section 138 (7).
[43] See paragraph 12.15 above for issues such as heads of argument.

Chapter 15: Applications

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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 or rescission;

- applications relating to jurisdictional objections; and
- other preliminary or interlocutory applications, such as, applications for legal representation to be allowed, applications for postponement, 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?

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 14 days 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 must be attached to the founding affidavit;
- In exceptional cases a commissioner may permit an affidavit to be substituted by a written statement.[4]

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.[5]

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 frame 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 fourteen days from the day on which the application was served on it, file the following[6]-

- 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[7].

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;
- 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 seven 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[8].

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[9].

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 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.[10]

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 fourteen 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 seven 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[11]. 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.

15.10.6 In order to ensure speedy resolution of disputes, the Commission 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.[12] 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 roll[13]; or

- by the commissioner dealing with the conciliation or arbitration (as the case may be); or

- on the papers.[14]

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.

15.12.2 If the application is set down for oral argument at the commencement of a conciliation or arbitration, 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 the process.

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

15.13.1 Where applications are heard on the motion roll or 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 on the motion roll or 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 motion roll 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.

15.13.5 The commissioner dealing with condonation applications set down together with conciliations or arbitrations must give *ex tempore* written rulings with brief reasons on the same day. A copy of the ruling must be handed to the parties and, if the application is granted, the conciliation or arbitration (as the case may be), must proceed immediately afterwards. Only in exceptionally difficult matters may the ruling be reserved, in which event, the ruling must be given within fourteen days.

15.14 What are the duties and responsibilities of CCMA staff when giving advice to prospective applicants and in processing applications?

CCMA staff should at least observe the following-

15.14.1 When advising an unrepresented applicant, such applicant should be warned in writing that the matter may be determined on the papers, that all the relevant factors should be dealt with in detail in his/her founding affidavit and that all submissions should be made in the founding affidavit.

15.14.2 On receipt of an application, staff must check that the provisions of rule 31 (set out in paragraph 15.2 and 15.3 above) were complied with. If the application is defective it must not be accepted and the applicant must be required to rectify the defect before the application is processed.

15.14.3 The CCMA date stamp must be placed on the application, the notice of opposition and the replying affidavit, respectively, on the day that it is received.

15.14.4 Subject to what is stated in paragraph 15.10 above and specifically paragraph 15.10.6, the fourteen day period allowed for service and filing of the notice of opposition and answering affidavit must have gone by before an application is set down for hearing. If no notice of

opposition and answering affidavit are served and filed during the fourteen day period, a date must be allocated for the hearing of the application.

15.14.5 Where a notice of opposition and an answering affidavit are served and filed, a date for the hearing of the application must be allocated once a replying affidavit is received or once the seven day time limit for delivering a replying affidavit has lapsed.

15.14.6 Once the relevant time period has lapsed, the application papers must be placed before the CSC or his/her delegate for instructions as to the manner in which the application should be determined. This is not necessary in condonation applications as that should be set down with the conciliation or the arbitration, as the case may be.

15.14.7 The applications, other than condonation applications, must thereafter be set down for determination in accordance with the instructions of the CSC or his/her delegate.

15.14.8 Where necessary, timeous notice of the set down should be given to all parties.

15.15 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.

15.16 Condonation Applications

15.16.1 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.

15.17 Applications to Join Parties

15.17.1 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; [15]

An application to join a party may be made out of necessity or mere convenience.[16]

15.17.2 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.[17]

15.17.3 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.[18] 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.

15.17.4 A 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 union may be joined as a party.[19]

15.17.5 There is no need to join a party who has elected to abide by the decision of a commissioner or, where applicable, the Commission.[20]

15.17.6 A joinder is not effected by simply changing the citation of a party.[21]

15.17.7 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.[22]

15.18 Applications to substitute a party

15.18.1 If it becomes necessary a commissioner may substitute a person/entity for an existing party on application by any party to the proceedings. [23]

15.18.2 Substitution would, for example, be appropriate in circumstances where a wrong party was cited as respondent.[24] If it is merely a question of a defective citing, an application should be brought to correct the citation of the party concerned.

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

15.18.4 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.[25]

15.19 Applications to correct the citation of a party

Where a party has been incorrectly or defectively cited, the CCMA may on application and on notice to the parties concerned, correct the error.[26]

15.20 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.[27] 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 same[28] 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.

15.21 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.[29]

For specific guidelines refer to Chapter 17 dealing with rescissions.

15.22 Applications to refer a dismissal dispute to the Labour Court

15.22.1 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[30], save that a party who has already requested an arbitration may not thereafter bring such an application.[31]

15.22.2 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

- 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 7 days to file an objection to the application.

15.22.3 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 following-[32]

- 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.

15.22.4 The Director's decision must be communicated to the parties within fourteen days of the time period allowed for an objection having lapsed.[33] 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.[34]

15.23 Applications for postponement

15.23.1 Conciliation processes may not be postponed under any circumstances while arbitrations may be postponed by agreement between the parties or on application by one of the parties.

15.23.2 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 more than seven days prior to the date on which the arbitration was due to be heard; [35]

15.23.3 Where there is no agreement either party may apply for a postponement of an arbitration.In this regard the normal requirements for applications must be met, save that the application may be delivered to the other party to the dispute and filed with the CCMA at any time prior to the scheduled date.[36] Where such an application is made, the CCMA may postpone the hearing without convening a hearing; alternatively, convene a hearing for further submissions to be made prior to making a decision. Such hearing

will normally be at the time that the arbitration was originally scheduled to take place but if possible and desirable, such hearing could be held earlier.

15.23.4 Oral applications for adjournments made on the date scheduled for the arbitration should be considered but if there is no explanation for not bringing an application for adjournment earlier and if this resulted in the other party incurring unnecessary costs, a costs order should be granted.

15.23.5 Unless there is an agreement to postpone an arbitration, applications for postponement should only be granted in circumstances where a party would be prejudiced if required to proceed with the hearing and where such party's inability to proceed was caused by circumstances beyond the control of such party.

15.24 Applications regarding jurisdictional objections

15.24.1 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.

15.24.2 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 the 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.

15.24.3 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.[37] The CCMA has jurisdiction to conciliate if an applicant has alleged that an employment relationship existed and a dispute concerning such issue must be decided at the arbitration stage.[38] 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.

15.24.4 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.

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[1] Rule 31 (1).
[2] Rule 31.
[3] Rule 31 (3).
[4] Rule 31 (7).
[5] Rule 31 (4) (d) read with Rule 9.
[6] Rule 31 (5).
[7] Rule 31 (5) (b).
[8] Rule 31 (6).
[9] Rule 31 (8).
[10] Rule 31 (9) (a).

[11] Rule 8.
[12] Rule 31 (10) allows the Commission to determine an application in any manner it deems fit.
[13] Rule 31 (9) (c).
[14] 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] Rule 26 (1) and (2).
[16] Rule 26 (1) to (3).
[17] Rule 26 (3).
[18] See *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008).
[19] *Selela & others v Rand Water* [2000] 11 BLLR 1355 (LC).
[20] *Selela & others v Rand Water* (*ibid*).
[21] *Mdlalose v Fila South Africa (Pty) Ltd* [2004] 3 BLLR 251 (LC).
[22] Rule 26 (5).
[23] Rule 26 (6).
[24] 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).
[25] Rule 26 (6).
[26] Rule 27.
[27] Rule 28.
[28] See *Naidoo v JNP Development CC t/a Constantia Construction* (1999) 20 ILJ 3026 (CCMA).
[29] Section 144 and Rule 32.
[30] Section 191 (6) to (8).
[31] Rule 33 (2).
[32] Section 196 (6).
[33] Rule 33 (5).
[34] Section 191 (9) and (10).
[35] Rule 23 (2).
[36] Rule 23 (3) and (4).
[37] *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."*
[38] 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 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]

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 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 dispute dealt with or to have his 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 refuse to accept a late referral if an application for condonation is not attached to it.[4]

16.2.2 Accordingly where a party files a referral or application document[5] and a case management officer (CMO) from the CCMA screening and allocations team (SAT) establishes that the referral is out of time, the CMO should not receive the referral and should advise the referring party to complete a condonation application form and submit it together with the referral. 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 Where a CMO receives a referral and subsequently establishes that the referral is out of time, the referring party may still apply for condonation. The Labour Court has held that a party may apply for condonation at any time after referring a dispute to the CCMA, despite the rule that suggests that condonation must be sought simultaneously with the referral.[6]

16.2.4 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.[7]

16.2.5 The words *"at any time"* have been interpreted to mean at any time prior to a certificate of non-resolution being issued.[8]

16.2.6 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 condoned before conciliation, a valid certificate of outcome cannot be issued.[9]

16.2.7 Accordingly where a CMO receives a referral and he/she subsequently establishes that the referral is out of time, he/she should notify the referring party in writing that the referral is defective and an application for condonation must be made. Further, he/she should advise the referring party that the CCMA lacks jurisdiction to deal with the late referral unless condonation is granted.

16.2.8 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. Further, the commissioner should advise the referring party that the CCMA lacks jurisdiction to conciliate unless condonation is granted.

16.2.9 Where it is only discovered at arbitration that the dispute was referred out of time, the commissioner dealing with the matter should not require the referring party to apply for condonation even though condonation was never applied for nor granted. This is because the Labour Appeal Court has held that where a certificate of non-resolution has been issued and has not been reviewed and set aside, the CCMA has jurisdiction to arbitrate, despite the late referral of a

dispute. This jurisdiction is derived from the certificate of outcome and not the condonation of a late referral.[10]

16.2.10 Where it is discovered at arbitration that a request for arbitration is out of time, the commissioner dealing with the matter should suspend the arbitration and advise the referring party of the need to apply for condonation. Further, the commissioner should advise the referring party that the CCMA lacks jurisdiction to arbitrate unless condonation is granted.

16.2.11 The general principle with regard to a late referral or application document is that a party should apply for condonation as soon as possible after becoming aware of the need for such application.[11]

16.3 How is a condonation application form completed?

16.3.1 In applying for condonation a party may use a pro-forma form supplied by the CCMA consisting of a notice of application and an affidavit.[12]

16.3.2 The pro- forma application form is completed by the applicant or his/her representative, by filling in the various blank spaces on the form. CCMA staff may also assist the applicant in completing the condonation application form.[13]

16.3.3 Both the notice of application and the affidavit provide for the citation of the parties to the dispute. This entails writing the names of the applicant and the respondent on the relevant space provided on the form. Where the applicant or respondent is a natural person, the full names and surname should be provided. Where the applicant or respondent is a legal entity, the correct legal citation of the company, close corporation or other entity should be provided. Where there is more than one applicant or respondent, details of the other applicants or respondents should be provided.

16.3.4 The notice of application should be addressed to the respondent. Accordingly, the name and the correct postal address of the respondent should be written on the form. This address may be used by the CCMA to send the condonation ruling and any other notices to the respondent.

16.3.5 The notice of application should be dated and signed by the applicant or the applicant's representative, who is entitled to represent the applicant in proceedings in terms of the LRA or CCMA Rules. Where there is more than one applicant, the notice of application should be signed by one of the applicants who has been mandated by the others to sign documents. A written list of the other applicants should then be attached to the notice of application.[14]

16.3.6 The applicant should provide his correct postal address on the notice of application. This address may be used by the respondent for serving opposing documents, if any, and by the CCMA when sending notices or the condonation ruling to the applicant.

16.3.7 The affidavit should be completed by the applicant whose full names and surname should be provided. Where there is more than one applicant, the affidavit should be completed by the applicant who has been mandated by the others to sign the notice of application, provided that where some of the information does not fall within the knowledge of the deponent, confirmatory affidavits by persons with such knowledge must be attached. Where the applicant is a legal entity, the affidavit should be completed by a representative of the company, close corporation or other entity who is entitled to represent the legal entity in proceedings in terms of the LRA or the CCMA Rules.

16.3.8 Item one of the affidavit deals with the background to the dispute. Under this item the applicant should specify the date on which he/she was dismissed or on which the alleged unfair labour practice occurred. Further, the applicant should specify the date on which an appeal or grievance was lodged with the respondent and the date on which the outcome of the appeal or grievance was handed down. This information assists the applicant and the CCMA staff to determine the degree of lateness of the applicant's referral to the CCMA.

16.3.9 Item two of the affidavit deals with the degree of lateness. In this regard the applicant should specify the extent of the delay in filing the referral or application document with the CCMA. This entails stating the actual number of calendar days that passed, following the expiry of the stipulated time period, before the applicant filed his/her referral with the CCMA. When calculating the calendar days, the date on which the specified time period expired is excluded and the date on which the referral was filed with the CCMA is included.[15]

16.3.10 Item three of the affidavit deals with attempts that the applicant may have made in actively following his matter before referring a dispute to the CCMA. Under this item the applicant should provide full details including dates, of any instances when he approached any persons or entities such as a union, the Department of Labour or Community Advice Centre for assistance prior to referring the dispute to the CCMA.

16.3.11 Item four of the affidavit deals with the reasons for the late filing of the referral or application document with the CCMA. Under this item the applicant should provide full details including dates of the incidents that caused the delay. Where there are documents that support the reasons provided by the applicant, such as medical

certificates, those documents should be attached to the affidavit in support of the application.

16.3.12 Item five of the affidavit deals with the applicant's prospects of success regarding the dispute. Under this item the applicant should provide sufficient facts to show that he/she will be successful in his/her referral if such facts are accepted. Generally, the applicant should provide details of how the respondent failed to comply with the requirements of substantive and procedural fairness.

16.3.13 Item six of the affidavit deals with the prejudice that the parties will suffer should condonation be granted or not be granted.In this regard the applicant should specify the adverse consequences that he/she will experience if condonation is refused and should comment on whether the respondent will suffer prejudice should condonation be granted.

16.3.14 Item seven of the affidavit deals with general issues. Under this item the applicant should specify any other factors that he deems relevant to his application and should be considered by the commissioner dealing with the condonation application, such as the importance of the case to the applicant or the public.

16.3.15 The affidavit should be sworn to, dated and signed by the applicant before a commissioner of oaths.

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.

16.4.3 Condonation applications are generally argued by reference to the affidavits only.[16] 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 the issue of condonation arises at conciliation or arbitration, the commissioner dealing with the matter should immediately suspend the conciliation or arbitration and deal with a condonation

application. In this regard the commissioner should first ascertain whether both parties are ready to proceed with an oral hearing.

16.4.5 If both parties are ready to proceed with an oral hearing, the commissioner may proceed to hear oral evidence and argument from the parties, without insisting that the parties first submit written application documents. After hearing oral evidence and argument from the parties the commissioner should adjourn briefly in order to consider the evidence and the argument.

16.4.6 The commissioner should communicate his decision to both parties in a written ruling with brief reasons. If condonation is granted, the conciliation or the arbitration (as the case may be) should proceed so that both processes can as far as possible be completed on the same day.

16.4.7 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.

16.4.8 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.[17] Further, the commissioner should advise the parties to submit their application documents within specified time periods.

16.4.9 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.

16.4.10 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 applicant does not have an automatic right to condonation**.** 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 but it is well-established that the commissioner dealing with a condonation should consider the following factors-

- the degree of lateness;
- 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 parties would suffer should condonation be granted or not be granted; and
- 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.[18] 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.[19]

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.[20] The weight that is given to any one factor, varies from case to case depending on the circumstances of each case.

16.5.5 An extremely long delay should weigh heavily against granting condonation.[21] However, this does not mean that a commissioner should automatically grant condonation where the delay is very short. The commissioner should consider all the other relevant factors.

16.5.6 When considering the reason for the late filing of a referral or application document, a commissioner should satisfy himself/herself that the explanation given by the applicant is reasonable and satisfactory.

16.5.7 Generally, a commissioner may accept the following reasons as reasonable explanations for an applicant's failure to comply with the prescribed time limits-

- The applicant was prevented by circumstances beyond his control from filing his referral or application document timeously, e.g. through illness or being incarcerated;

- The applicant first attempted to resolve the dispute by following the respondent's internal procedures and trying to resolve the dispute together with the respondent, thus delaying the referral of the dispute;

- The applicant was unrepresented, unsophisticated and illiterate, did not know about his employment rights and the time limits for exercising such rights and was not advised by the respondent of his right to refer a dispute to the CCMA;

- The applicant approached the CCMA to refer a dispute and was advised to lodge his/her referral with a bargaining council, which in turn advised him/her that it has no jurisdiction over his dispute and referred him/her back to the CCMA. By the time the applicant filed his/her referral with the CCMA, the 30-day period had expired.

16.5.8 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.[22] 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.[23]

16.5.9 A commissioner may refuse condonation solely on the grounds that the reason given by the applicant for a late referral or application document is unacceptable.[24]

16.5.10 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 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.

16.5.11 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.

16.5.12 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.

16.5.13 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.

16.5.14 Generally, a commissioner should always exercise the discretion to grant or refuse condonation, judicially, by carefully and thoroughly considering all the relevant facts and potential consequences. After applying his/her mind to all the facts, a commissioner should grant or refuse condonation and support the decision by reference to the facts.[25]

16.6 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 that the CCMA does not have jurisdiction and rulings refusing to condone late referrals or late requests for arbitration, bring the matters to an end and may be taken on review.

16.7 What steps are followed by the CCMA after a condonation application has been determined?

16.7.1 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.

16.7.2 Where a commissioner has dealt with a condonation application by oral hearing and has not communicated his decision to both parties, he should submit the case file together with his written ruling and the reasons for it to a CMO.

16.7.3 The CMO should notify the parties of the ruling, where the commissioner has not already done so.

16.7.4 Where condonation was granted and the next process did not proceed on the day, the CMO should proceed to set the matter down for the next process, being either conciliation, con-arb or arbitration,

16.7.5 Where condonation has been refused, the CMO should proceed to close the file and place case notes on the system to the effect that

condonation was refused and the CCMA has no jurisdiction to deal with the referral or application.

16.8 What are the duties of the CCMA staff when dealing with an application for condonation?

16.8.1 The CMO at SAT is required to -

- advise the applicant if a condonation application is necessary;
- explain the condonation application procedure to the Applicant;
- assist the applicant to make the condonation application, if necessary;
- receive the condonation application, place a date stamp on it and file it in the correct file;
- receive the notice of opposition from the respondent, if any, place a date stamp on it and file it in the correct file;
- receive the replying affidavit from the applicant, if any, place a date stamp on it and file it in the correct file; and
- carry out the general duties and responsibilities required for applications, which are referred to in Chapter 15.

16.8.2 The CSC or a delegate is required to-

- decide, in cases of doubt, whether the application is to be determined on a motion roll or by the commissioner dealing with the conciliation or arbitration.

16.8.3 The CMA is required to -

- draft the notice of set down, if required;
- ensure that the notice of set down is served on the parties and that proof of service is placed in the file, if required;
- enrol the application on the motion roll, if required;
- notify the parties of the ruling, if this has not been done by the commissioner; and
- set the matter down for the next process or close the file.

16.8.4 The commissioner is required to-

- determine the issue of condonation by exercising his discretion judicially;
- advise the parties of his decision, where possible;
- forward the case file together with a written ruling to the CMO; and
- provide the CMO with an electronic copy of the ruling.

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. Where condonation is refused the dispute falls away due to lack of jurisdiction and the 30-day period does not kick in.

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[1] Section 191(2) of the LRA specifies that the CCMA may, on good cause shown by an employee, permit the employee to refer a dispute to conciliation at any time after the expiry of the 30-day period. Section 136(1) (b) specifies that the CCMA may, on good cause shown, permit a party to request arbitration after the expiry of the 90-day period. Rule 9 (1) of the CCMA Rules specifies that the requirement for condonation applies to any referral or application document delivered outside the time periods prescribed in the Act or the rules. Rule 35 specifies that the CCMA may, on good cause shown, condone any failure to comply with the time limits set out in the Rules.

[2] Section 191(1) (b) specifies that an alleged unfair dismissal dispute must be referred to the CCMA within 30 days of the date of dismissal or within 30 days of the employer's final decision to dismiss or uphold the dismissal. This section further specifies that an alleged unfair labour practice dispute must be referred to the CCMA within 90 days of the act or omission which allegedly constitutes an unfair labour practice or within 90 days of the date on which the employee became aware of the act or omission. Section 136(1) (b) specifies that a dispute must be referred for arbitration within 90 days of the date on which a certificate of non-resolution was issued.

[3] Rule 9 (2).

[4] Rule 10(3) and Rule 18 (3).

[5] 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.

[6] *Weltevrede Kwekery (Pty) Ltd v CCMA & others* (2006) 7 BLLR 706 (LC).

[7] Section 191(2).

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

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

[10] *Fidelity Guards Holdings (Pty) Ltd v Epstein* LM N.O [2000] 12 BLLR 1389 (LAC).

[11] *CWIU & another v Ryan & others* (2001) 3 BLLR 337 (LC).

[12] Rule 31(2) specifies that "an application must be brought on notice to all persons who have an interest in the application" and sub-rule (4) states that "the application must be supported by an affidavit".

[13] Rule 9 (4).

[14] Rule 31(3) read with rule 4.

[15] Rule 3

[16] 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.

[17] Rule 31(7).

[18] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

[19] *Moila v Shai NO & others* (2007) 27 ILJ 935 (LAC).

[20] *Melane v Santam Insurance Co Ltd* and *SA Broadcasting Corporation v Commission for Conciliation, Mediation & Arbitration & others* 2003 (24) ILJ 999 (LC).

[21] *NUM v West Holdings Gold Mining* 1994 (15) ILJ 610 (LAC).

[22] *Xiyaya v African National Congress* 2000 (4) BLLR 477 (LC), *Parker v V3 Consulting Engineers (Pty) Ltd* 2000 (21) ILJ 1192 (LC) and *Kolobe v Proxenos* 2000 (21) ILJ 1130 (LC).

[23] *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).

[24] *Mziya v Putco Ltd* (1999) BLLR 103 (LAC) and *Waverly Blankets Ltd v Ndima* (1999) 11 BLLR 1143 (LAC).

[25] *Coates Brothers (SA) Ltd v Shanker & others* case no.D1735.01 dated 15 November 2002.

Chapter 17: Rescissions and variations

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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;*
- *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 and provides that: "*an application for the variation or rescission of an arbitration award or ruling must be made within fourteen days of the date on which the applicant became aware of (a) the arbitration award or ruling; or (b) a mistake common to the parties"* and that *"a ruling made by a commissioner which has the effect of a final order, will be regarded as a ruling for the purposes of this rule."*

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).[1]

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. There may, however, be exceptional circumstances such as an error of law, e.g. where the commissioner did not know of a binding judgment of the Labour Court or Labour Appeal Court.

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.

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 In terms of rule 32 a rescission application must be brought within fourteen days of the date on which the applicant became aware-

- of the award; or
- of the ruling; or
- the mistake common to the parties (as the case may be).

17.5 What are the requirements for a proper rescission application in terms of section 144(a)?

17.5.1 Rule 31 deals with applications generally and applies to rescission applications.[2]

17.5.2 The notice of application must be signed by the party bringing the application subject to rule 4. The notice of application must therefore be signed by one of the following-

- the party; or
- by a person entitled in terms of the LRA or the rules to represent the party in the proceedings; or
- if the rescission application is brought by more than one employee, by an employee party who is mandated by the other employee parties to the application, to sign the notice of application on their behalf, provided that a written list of such employees must be attached to the notice of application.

17.5.3 The notice of application must state all the matters referred to in rule 31(3). This means that it should be in the form set out in the attached suggested notice of application. The notice of set down must contain a warning that the matter might be heard on the papers only and that an answering affidavit must contain all the facts and submissions that the respondent might want to rely on. Applications that are out of time must contain a prayer (“request” or “application”) that the late application be condoned.

17.5.4 A founding affidavit must be attached to the notice of application and must deal with all the matters referred to in rule 31 (4). A pro forma affidavit is attached hereto.

17.5.5 In particular the following matters should be addressed in the founding affidavit-

- the date on which the award or ruling was made;
- the date on which the award or ruling came to the notice of the applicant in the rescission application;
- whether the application is brought within fourteen days after the applicant became aware of the award or ruling;
- the grounds on which rescission is sought must be set out as further explained in paragraph 17.5.6.

17.5.6 In the founding affidavit the applicant must indicate in what manner the CCMA allegedly gave notice of set down and whether or not it is admitted that such notice was received.

If it is denied that notice was received the applicant must explain-

- why the notice of set down sent by registered post was not received; or
- why the applicant did not receive the faxed notice despite the fax transmission slip indicating that it was successfully transmitted.

If it is admitted that the notice of set down was received or if there is doubt whether or not the notice of set down was received the applicant must set out facts indicating-

- what the explanation is for not attending the hearing and why it is alleged that the failure to attend was not due to wilful default or gross negligence;
- that the application is *bona fide* (“genuine”) and not brought solely for the purposes of causing a delay; and
- that the applicant has a *bona fide* case on the merits, i.e. the applicant must set out facts, which if proved during a hearing, would entitle the applicant to relief.

17.5.7 In the case of late applications the founding affidavit must deal with the grounds on which condonation is sought and the following must specifically be dealt with-

- the extent of the delay;
- the reason for the lateness;
- the prospects of success on the merits;
- the importance of the matter; and
- the prejudice that the applicant may suffer should condonation not be granted and the prejudice that the respondent may suffer should condonation be granted.

17.5.8 In terms of rule 31(2) a rescission application must be brought on notice to all persons having an interest in the matter. Proof that such notice was given must be attached to the notice of application, e.g. by attaching a registered post slip or a fax transmission report or a written acknowledgment of receipt or an affidavit setting out the manner in which notice was given.

17.5.9 A commissioner dealing with the matter has a discretion whether to allow statements instead of affidavits.

17.6 What are the duties and responsibilities of CCMA staff in minimising the need for rescission applications?

17.6.1 Steps must be taken to improve the efficiency of the CCMA and to reduce the number of rescission applications. Numerous default awards and subsequent rescission applications come about because the notice of set down is sent to incorrect addresses or fax numbers. A joint effort by all staff members is required to eliminate this.

17.6.2 CCMA staff who assist employees to complete referral documents should-

- ask employees for documentary proof of both the employee's and the employer's address and fax numbers;
- ensure that this information is correctly recorded in the referral document;
- when addresses or fax numbers are incorrect or incomplete, require the employee to obtain the correct information before the referral document is submitted;
- if possible, include the cell phone number of both parties in the referral document so that they can also be informed of set downs by SMS.

17.6.3 If there is a chance that the employee will not receive notices sent to his/her address then the employee must be advised to contact the CCMA at a particular time to be informed of the date of set down. This must be recorded in writing and the employee must agree in writing that he or she will contact the CCMA at the specified time. This agreement must be attached to the referral document.

17.6.4 As soon as a party is informed of the date of set down, a note must be made in the file of the date and time the information was given. If a

party is informed in person, they must acknowledge this in writing and the acknowledgement must be placed in the file.

17.6.5 Referral documents must be carefully screened by SAT staff to ensure that the employer's address and/or fax number are adequate. If not, the employee must be required to provide adequate particulars or an adequate address or fax number.

17.6.6 During capturing it must be ensured that both the employee and employer's addresses and fax numbers are correctly captured on the CMS.

17.6.7 When a request for arbitration is received, it must be checked that the addresses and fax numbers correspond with the particulars on the computer system. If not, the relevant changes to the CMS must be made.

17.6.8 When correspondence is received from parties the particulars contained in such correspondence should be checked against the information on the CMS and changes made to the CMS where necessary.

17.6.9 Every time matters are postponed or adjourned after the initial set down, the commissioner dealing with the matter must get confirmation of their particulars from the parties. All changes must be reflected on the result sheets. When parties are represented by legal practitioners special care should be taken to ensure that the result sheet reflects the particulars of the legal practitioner including the address and fax number of the legal practitioner. The CMO must check the result sheet prior to setting the matter down again and must sign the result sheet as proof that it was checked for changes to addresses and fax numbers and that necessary changes were reflected on the CMS.

17.6.10 In cases where an award or ruling is rescinded due to notices being sent to an incorrect address or fax number, the commissioner granting rescission must clearly state this in the reasons for granting rescission and the correct particulars, addresses and/or fax number must be reflected in such reasons. The SAT staff and the CMO dealing with the matter thereafter must change the CMS to reflect the correct particulars, addresses and fax numbers and particular care should be taken to ensure that subsequent notices of set down are sent to the correct addresses and or fax numbers.

17.6.11 When perusing files prior to set down, commissioners should check whether there were changes in addresses and/or fax numbers and should draw the attention of the CMOs to it on the perusal form. CMOs should not only check on such perusal forms for changes in addresses or fax numbers but should also check the file itself for such changes.

17.6.12 Before sending out notices of set down the CMA should check through the whole file for any changes to particulars, addresses and fax numbers and ensure that the notices are sent to the correct addresses and fax numbers. If the CMS has not been updated this must be done so that the correct particulars, addresses and fax numbers are reflected.

17.6.13 After sending out notices of set down, proof of-

- posting a registered item; or
- the fax transmission slip (or copies thereof)

must be signed, attached to the notice, and placed in the file by the CMA sending the notice.

If a notice of set down was collected in person, a written acknowledgement of receipt must be attached to the notice and placed in the file.

17.6.14 After sending out notices of set down in part-heard matters, and especially if such matters are set down for a number of days, CMOs must phone the parties to establish that they have received the notices. A note of who was phoned and whether it was confirmed that the notice was received, must be made in the file.

17.6.15 Correspondence from parties requesting an adjournment or indicating that they would not attend a process must be responded to. The full correspondence must be placed in the file. If an adjournment is not granted, the parties should be reminded that they must attend the hearing.

17.6.16 CCMA staff should at every opportunity impress upon the parties the need to ensure that the CCMA is informed of changes of addresses and fax numbers and the serious consequences of a failure to attend a process after receiving a notice of set down.

17.6.17 Conciliating and arbitrating commissioners should ensure that notice was given to an absent party by checking that the file contains proof that the notice was served on or sent to the correct address or fax number.

17.6.18 Should the employer party be absent, the applicant must confirm the correctness of the address or fax number of the employer under oath or affirmation. Where possible the applicant should be required to provide proof of the correctness of such address or fax number.

17.6.19 Where there is no proof that the notice was sent to an absent party or where the proof shows that it was sent to an incorrect address, arbitrators should adjourn the matter so that proper notice may be given.

17.6.20 If it is discovered that a notice of set down was sent to an incorrect address due to an administrative error this must be brought to the attention of the Registrar.

17.7 What are the duties and responsibilities of CCMA staff in dealing with rescission applications?

17.7.1 The notice of application as well as the founding affidavit should be screened to ensure that the rules were complied with. If the rules were not complied with the application papers should be returned to the applicant explaining what rules were not complied with.

17.7.2 Check that the application was filed timeously and, if not, that condonation was applied for. If condonation was not applied for, the application for rescission should not be accepted until the condonation application is filed.

17.7.3 Do not accept rescission applications if not accompanied by proof that the other party was given notice of the application.

17.7.4 When a proper rescission application is received, the CCMA date stamp must be placed on the notice of application as proof of the date on which the application was filed, i.e. as proof that it was filed timeously or to indicate the degree of lateness.

17.7.5 The file must be pended for 14 days to await a possible notice of opposition and answering affidavit.

17.7.6 A date stamp must be placed on the notice of opposition to indicate whether it was timeously received.

17.7.7 When a notice of opposition and answering affidavit is received or once the 14-day period has expired, whichever occurs first, the file must be placed before the CSC or his/her delegate. He/she will decide whether or not the rescission application should be determined on the papers or whether it should be placed on the motion roll for oral argument or whether it should be heard by the commissioner who previously dealt with the matter.

17.7.8 Where a rescission application is to be set down for oral argument, parties must be sent notices of set down. Care should be taken that the notices are sent to the correct addresses or fax numbers and that proof of this is placed in the file.

17.7.9 Five rescission applications should be placed on the motion roll per day and one hour should be allowed for the hearing of each matter.

- Where possible, commissioners must give *ex tempore* (“immediate” and “oral”) rulings, which must be recorded in writing. Copies of the ruling containing brief reasons for granting

or refusing the application, must be given to the parties at the end of the hearing.

- In a more complex matter an *ex tempore* ruling may be made in writing, with an undertaking to provide reasons for the ruling at a later date. Copies of this ruling must be given to the parties at the end of the hearing. Once the reasons for the ruling are provided, copies must be sent to the parties, and placed in the file.

- If it is a complex matter requiring research or analysis, the parties must be advised that a written ruling shall be issued within 14 days.

17.7.10 Rescission applications must be heard within 30 days of the receipt of the notice of opposition or once the 14-day period for filing it has expired.

17.7.11 Parties must be given 14 days notice of the hearing if the matter is set down for oral argument.

17.8 What should be considered, in determining a rescission application brought in terms of section 144 (a) and in what format should the ruling be?

17.8.1 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.

17.8.2 In deciding rescission applications, commissioners must further consider whether it was legally competent to have issued the award in the first place. If it is clear that the CCMA did not have jurisdiction to arbitrate the matter and where the arbitrating commissioner had not considered the question of jurisdiction, it should be considered whether the commissioner dealing with the rescission application should not rescind the award for that reason even on his/her own accord. This may, for example, be done if it was a matter that had to be adjudicated by the Labour Court or where more compensation was awarded than that allowed by the LRA.

17.8.3 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.

17.8.4 Commissioners must further bear in mind that fairness and expedition should be balanced but that fairness should prevail when the outcome would otherwise result in an injustice. Nevertheless if there is no explanation for the default or if the affected party has no case on the merits, rescission must be refused.

17.8.5 A suggested format for a rescission ruling is attached.

17.9 What should be considered in determining a variation or rescission application brought in terms of section 144 (b)?

Commissioners should consider whether to clarify the ambiguity or to rectify the obvious error or omission referred to in the application papers.

17.10 What should be considered in determining a rescission application brought in terms of section 144 (c)?

Commissioners should consider whether the mistake was in fact common to both parties and whether the award or ruling would not have been granted had it not been for such common mistake on the part of the parties.[3]

17.11 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.

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[1] 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).

[2] Rule 31 (1) (a).

[3] In *McDonalds SA (Pty) Ltd v CCMA & others* [2003] 10 BLLR 1020 (LC), the Labour Court explained -

"A mistake common to the parties entails that both parties are mistaken as to the correctness of certain facts such as, for example, where the parties agree on a statement of facts which subsequently proves to be incorrect, or if the parties consent to judgment in justus error. The mistake must be common to both of the parties. A mistake by one of the parties, or the presiding officer, is insufficient to found an application in terms of the rule. Moreover, the mistake must relate to an issue, which is relevant to the question, which the court is called upon to decide or in the procedure, which was adopted and must not be irrelevant. In other words, there must be a causative link between the mistake and the granting of the judgment or order (see Erasmus op cit at B1-311; Brassey op cit at A7:70–71).

IN THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION HELD AT

CASE NO:_____

In the matter between

Employee party

And

Employer party

NOTICE OF RESCISSION APPLICATION

TO: The Registrar of the CCMA

AND TO: _____Party in whose favour award was granted

_____Address

_____

TAKE NOTICE that_____the party against whom the award/ruling was granted, hereby applies for the award/ruling made on_____(date) to be varied/rescinded.

TAKE FURTHER NOTICE that the affidavit of _____, the deponent to the founding affidavit annexed hereto, is filed in support of the application.

TAKE FURTHER NOTICE that any party that intends to oppose the matter must deliver a notice of opposition and answering affidavit within fourteen days of this application being delivered.

TAKE NOTICE FURTHER that this application may, unless otherwise directed by the CCMA, be decided on the papers and that all facts and submissions relied upon must be contained in the answering affidavit. Should an answering affidavit not be filed timeously, the application will be decided only on the founding affidavit.

TAKE NOTICE FURTHER that the party bringing this application has appointed the address set out below as the address where such party will accept delivery of all notices and documents in these proceedings.

DATED at _____ this ____ day of _____

_____

Signature of party bringing the application

His/her address > _____

_____

His/her fax no > _____

IN THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION HELD AT

CASE NO:_____

In the matter between

Employee party

And

Employer party

FOUNDING AFFIDAVIT IN RESCISSION APPLICATION

I, the undersigned,

_____
(Full name of the deponent)

hereby make oath and state as follows:

1. Background:

1.1 A hearing was held in my absence on _____.

1.2 An award/ruling was issued on _____

1.3 The award/ruling was received by post / fax /hand on_____

2. Notice of set down was received/ was not received.

(If the notice of set down was not received, explain hereunder**.)**

2.1 I established from the CCMA that the notice of set down was sent by registered post/ fax to _____

2.2 The address/ fax number is correct/ incorrect.The correct address/fax number is_____

2.3 I did not receive the notice of set down due to the following circumstances:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

3. Explanation for non-appearance at the hearing

(If the notice of set down was received, it needs to be shown that the non-appearance was not due to wilful default or gross negligence and a detailed explanation is required).

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

4. I have a *bona fide* case as explained hereunder.

(Detailed facts must be set out and it must be such that if it were proved during a hearing it would entitle the party seeking rescission to relief. In dismissal cases it must be explained in detail, how the dismissal occurred, whether there was a fair reason for it and what procedure was followed).

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____
Deponent's signature

I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was sworn to and signed before me at_____ on this_____day of _____ the regulations in Government Notice R1258 of 21 July 1992 as amended having been complied with.

_____
COMMISSIONER OF OATHS

FULL NAMES:
ADDRESS:
DESIGNATION:
AREA

RESCISSION PROCEEDINGS

Commissioner: _____
Case No.: _____
Date of Ruling: _____

In the matter between

_____
Employee party

And

_____
Employer party

REASONS FOR RULING

Following a hearing that took place in the absence of the employer / employee party ("the affected party") on _____ an award was issued on _____. The award came to the attention of the affected party on _____ and the affected party applied for rescission on _____.

*The affected party was not given proper notice of the hearing in that
_____
_____
_____

*The affected party was given proper notice of the hearing but did not attend the hearing because
_____
_____
_____
_____
_____
_____
_____
_____

The non-appearance was accordingly due to/ not due to wilful default or gross negligence.

The affected party has / does not have a *bona fide* case in that

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Had the commissioner been aware of this, the hearing would not /would still have proceeded in the absence of the affected party and the award would not/ would still have been granted. The award was accordingly erroneously granted/ not erroneously granted.

RULING

The application is granted/ refused and the award dated _____ is/ is not rescinded.

DATED at_____ this _____ day of _____.

_____
COMMISSIONER

Chapter 18: Costs and taxation

Contents

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18.13 Discretion and powers of a taxing officer.
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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 Commission 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 Rule 39 (1) of the CCMA Rules confirms that *"the basis on which a commissioner may make an order as to costs in any arbitration is regulated by section 138 (10) of the Act."*

18.1.3 Rule 39 (2) prescribes the rate at which costs are to be taxed and provides *"the taxing master must tax any bill of costs in connection with service rendered in connection with proceedings before the Commission on Schedule A of the prescribed Magistrates' Court tariff, in terms of the Magistrates' Court Act, No 32 of 1944, unless the parties agree to a different tariff."*

18.2 What are the relevant considerations when making cost orders?

18.2.1 Commissioners have a wide discretion whether to award costs or not but such discretion must be exercised with proper regard to all of the facts and circumstances of each case. The general rule of our law is

that the successful party is normally awarded costs unless special circumstances exist. This general rule will however yield where considerations of fairness require it. Considerations of fairness include the factors set out in the subparagraphs below.[1]

18.2.2 Arbitration proceedings may be part of an overall conciliation process and parties, particularly individual employees, should not be discouraged from approaching the CCMA in such circumstances.

18.2.3 Cost orders may discourage parties from approaching the CCMA and consideration should be given to avoid them especially where there is a genuine dispute and the approach to the CCMA was not unreasonable. A party should not be penalized unnecessarily even if such party is misguided in bringing his or her application for relief or defending the matter, provided the party is *bona fide.*

18.2.4 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 and the conciliation process.

18.2.5 The conduct of the parties at the time that the dispute arose, as well as during the proceedings, may be such that the normal principle should not be followed.

18.2.6 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.[2]

18.3 At what rate should costs be taxed?

18.3.1 The words “Schedule A” in Rule 39 (2) must be interpreted as Table A as there is no Schedule A. Table A contains three scales, i.e. Scales A, B and C.

- When the amount in dispute is less than or equal to the jurisdiction of the Small Claims Courts, costs shall be taxed on Scale A.

- When the amount in dispute is more than that but less than or equal to R50 000-00, costs shall be taxed on Scale B.

- Where the amount in dispute exceeds R50 000-00, costs shall be taxed on Scale C.

18.3.2 Commissioners should specify in their awards on what scale the costs are to be taxed and can only award costs on one of the Magistrates’ Court scales. Costs on the High Court scale may not be awarded unless the parties have agreed to it, except in respect of some of counsels’ fees, as indicated in paragraph 18.6.2 below.

18.3.3 In deciding on what scale costs should be awarded, commissioners must consider the following-

- *Where compensation was claimed*
  The amount in dispute is the amount claimed, irrespective whether the full amount is awarded. If an applicant is awarded less than what was claimed, the amount of compensation awarded should be taken into account in deciding on what scale costs is to be awarded. When awarding costs in favour of a respondent, the amount of compensation claimed should be a deciding factor in deciding the scale on which costs are to be awarded.

- *Where reinstatement was claimed*

  Paragraph 2 (b) of Table A provides that where the amount in dispute is not apparent on the face of the proceedings, costs shall, unless the arbitrator orders otherwise, be on the higher rate. Therefore, in cases involving a claim for reinstatement, costs should be taxed on Scale C unless the arbitrator orders otherwise.

18.4 What costs may be awarded in the case of adjournments?

In granting costs orders when a matter is adjourned, it is practice to order that the wasted costs occasioned by the adjournment be paid, that such costs shall include the costs of preparation and to specify the scale on which the costs are to be taxed.

18.5 May a costs order be granted in respect of repeated preparations caused by adjournments?

If costs are awarded in a case that was adjourned and where the hearing was finalised considerably later, arbitrators should consider whether to authorize a refresher in respect of repeated preparations. In this regard arbitrators may in addition to the fee allowed for preparing for trial, allow a refresher fee in postponed or partly heard cases. In such circumstances an arbitrator should indicate in respect of what day(s) a refresher is allowed in respect of preparation for trial.

18.6 When may counsel's fees be allowed on taxation, when may it be allowed on the High Court scale and when is a travelling allowance allowed on taxation?

18.6.1 In terms of Item 6 in Part 1 of Table A, *"fees to counsel shall be allowed on taxation only in cases falling within Scale B or C or where a court has made an order in terms of rule 33 (8) and shall not be so allowed unless payment thereof is vouched by the signature of counsel*." Therefore if the intention is to include counsel's fees in a costs order on Scale A, this needs to be specified in the award before it will be allowed on taxation.

18.6.2 An arbitrator has a discretion to award a higher amount in respect of counsel's fees in respect of trial brief, consultation, refresher and drawing up pleadings. It is therefore possible to order that such aspects of counsel's fees be taxed on the High Court Scale.

18.6.3 The travelling allowance of R1-50 per km payable to counsel in cases where the hearing is more than 30 km from the nearest seat of the High Court, is only allowed by special order. If it is not specified in the costs order, the costs order does not include such travelling allowance.

18.7 May a costs order be awarded where legal practitioners are not involved?

Legal costs cannot be awarded where parties are not represented by legal practitioners in a hearing. However, legal costs are not the only costs that a party incurs in proceedings. Disbursements, such as, travelling and accommodation costs of witnesses, costs for copies of documents, or other wasted costs, provided they have been reasonably incurred, may be awarded to a party. In this regard, the commissioner when ordering costs must clearly specify what costs are ordered.

18.8 What fees may be allowed for drawing up bills of costs and for attending taxation of costs?

18.8.1 For drawing up bills of costs, a fee of 5% of the fees is allowed.

18.8.2 For attending taxation, a fee of 5% on the total of the bill is allowed.

18.8.3 The taxing master may deny the attorney presenting the bill the taxation costs, (the drawing fee and attendance fee), if more than 25% of the items on the bill of costs, excluding expenses, or of the total amount of the bill of costs, excluding expenses, is taxed off. (See in this respect Section 33 (18) of the rules of the Magistrates' Court).

18.9 How to request taxation?

18.9.1 In terms of rule 39 (5), the person requesting taxation must complete LRA Form 7.17 and annex the bill of costs thereto.

18.9.2 LRA Form 7.17 together with the bill of costs must be submitted to the provincial registrar where the cost order was made and served on the other party[3].

18.10 How would taxation be set down?

18.10.1 In terms of rule 39 (5) the person requesting taxation must satisfy the taxing officer that the party liable to pay the bill has received notice of the date, time and place of the taxation[4].

18.10.2 Rule 39 (5) (should be rule 39 (6)), provides that notice to the other party may be dispensed with if the arbitration award containing the cost order was given by default, i.e. if the other party failed to appear or be represented at the arbitration or if the other party has consented in writing that the bill may be taxed in the absence of such party.

18.11 Who may appear at taxation?

Rule 39 (5) only provides that the person requesting taxation must satisfy the taxing officer of that party's entitlement to be present at the taxation[5].

18.12 Duties and functions of a taxing officer

18.12.1. At the commencement of the taxation proceedings the taxing officer must –

- satisfy himself or herself that notice of the date, time and place of the taxation has been given to both parties;
- if the parties or any of them are not present despite proper notice, ascertain whether an application for postponement has not been received or whether the party in default has not consented in writing to the taxation taking place in its absence;
- peruse and make sure that he or she understands the award in so far as it deals with the question of costs;
- peruse the bill of costs and ascertain whether the items in the bill of costs are covered by the terms of the costs order in the award[6]; and
- peruse the bill of costs and ascertain whether the correct tariff is applied in drafting the bill of costs[7].

18.12.2 If the party requesting taxation is absent or not represented at the taxation proceedings despite proper notice and there is no application for postponement of the taxation proceedings or consent by such party that the taxation may proceed in its absence, the taxing officer must remove the taxation from the roll, unless such party was also not present (in default) at the arbitration proceedings, in which case the taxation may proceed in its absence[8].

18.12.3 If the party liable to pay the bill of costs is absent or not represented at the taxation proceedings despite proper notice and there is no application for postponement of the taxation proceedings, the taxing officer may proceed with the taxation in the absence of such party[9]. (If there is written consent by such party that the taxation may continue in its absence, the proceedings may of course also proceed).

18.12.4 If the taxing officer decides to proceed with the taxation, the taxing officer must -

- explain the nature of the proceeding to the parties;
- explain the rights and responsibilities of the parties during the proceedings;

- explain his or her powers as taxing officer[10];
- record the proceedings, if evidence is led;
- ensure that both parties understand the award in so far as it deals with the question of costs;
- invite the party requesting taxation to introduce the bill of costs;
- ensure that the party liable to pay the bill also understands the bill of costs;
- identify any items which are not covered by the cost order in the award, if any;
- point out to the parties if the correct tariff has not been applied to draft the bill of costs;
- deal with any preliminary issues that may be raised and make rulings if necessary after both parties have been afforded an opportunity to make submissions;
- table the items in the bill of costs one by one and invite the party liable to pay the bill to indicate if he or she has any objection to the particular item, and if so to state the objection and the reasons for that;
- request the party that introduced the bill (the party requesting taxation) to respond to the objection and if necessary to substantiate its claim in the particular item;
- allow the opposing party to reply if he or she wishes to do so;
- after dealing with each and every item in the bill of costs either allow, disallow or tax down any particular item and issue a decision in the form of an *allocatur*[11] at the end of the taxation proceedings or reserve his or her decision on any particular item, in which case an *allocatur* must be issued within 14 days from the date of the taxation[12].

18.13 Discretion and powers of taxing officer

18.13.1 Although the taxing officer has a discretion to allow, disallow or tax down any item on a bill of costs, the approach should be to allow all costs, charges and expenses as appear to him or her to have been necessary or proper. It relates to all costs reasonably incurred by the party in whose favour the costs order was made, which imports a value judgment by the taxing officer as to what is reasonable. A taxing officer has to carry out the cost order, not to vary it. Therefore the prescribed tariff should not be seen as a mere guide line. Any expenditure provided for in the tariff and reasonably incurred must be paid for strictly in accordance with the tariff and therefore allowed[13]. However, a taxing officer should not allow the fees merely on the assumption that the work charged for has been done and that it was reasonable.

18.13.2 If there is an objection or if the taxing officer on his/her own accord deems it necessary, he or she has the power to demand proof to his/her satisfaction that the services charged for have actually been rendered. In this process the taxing officer may request documents

and even hear evidence, etc. He or she may also determine disputes arising from objections.

18.13.3 A taxing officer does not have the power to determine defences to payment and prescription at taxation. A taxing officer may also not tax a bill of costs where an officer of another forum is empowered to do so.

18.14 Review of taxation

18.14.1 The decision of a taxing officer is subject to review in terms of section 157(8) of the LRA.

18.14.2 Once a review application has been filed or a request for reasons has been received, the taxing officer concerned must within 10 days from the date the request for reasons has been received or the date on which the notice of review has been served on the CCMA and the taxing officer, provide brief reasons for his or her decision on all or any particular item allowed, disallowed or taxed down, as the case may be[14].

18.15 CCMA taxation tariff

Scale	A	B	C
Taking instructions to issue a referral for con-arb	R 394-00	525.00	630.00
Completing Form 7/11 (inclusive of copies, attendances and service)	R 198.00	275.00	329.00
Notice of opposing the relief claimed and respondent's attorney placing itself on record	R 33.00	33.00	40.00
Completing form 7/13 (where necessary),	R 19-00	19-00	23-00
Every necessary consultation (per 15 minutes or part thereof)	R 117-00	117-00	140-00
Telephone consultations for every 5 minutes or part thereof subject to a maximum of R113-00 per consultation	R 33.00	33.00	40.00
Recording of witness statements ((per 15 minutes or part thereof)	R 117-00	117-00	140-00
Preparing bundles of documentary exhibits and inspecting bundles (per 15 minutes or part thereof)	R 117-00	117-00	140-00
Perusing documents (per 100 four letter words)	R 7-00	7-00	7-00
Attendance at settlement negotiations (per 15 minutes or part thereof)	R 117-00	117-00	140-00
Attendance at pre-arb conference (per 15 minutes or part thereof)	R 117-00	117-00	140-00
Drawing minutes of pre-arb conference (per 100 four letter words)	R 19-00	19-00	19-00
Copies of pre-arb conference minutes (per page)	R 3-00	3-00	3-00
Service of pre-arb conference minutes (per service)	R 12-00	12-00	12-00
Correspondence written (inclusive of copies, attendances and service) per 100 four letter words	R 19-00	19-00	23-00
Correspondence received (per 100 four letter words)	R 12-00	19-00	23-00
Preparing for arbitration (if no counsel)	R 544-00	739-50	887-50
Refresher i.r.o. preparation re postponements	R 338-00	478-50	574-50
Time spent waiting for hearing (per 15 minutes or part thereof)	R 79-00	79-00	95-00
Attending at arbitration (per 15 minutes or part thereof)			
- if no counsel	R 117-00	117-00	140-00
- with counsel	nil	39-00	46-50
Heads of argument (if required) per 100 four letter words	R 19-00	19-00	19-00

Copies of heads of argument (per page)	R 3-00	3-00	3-00
Service of heads of argument (per service)	R 12-00	12-00	12-00
Travelling time subject to rule 33(9) (per 15 minutes or part)	R 79-00	79-00	95-00
Subsistence and travelling expenses	Actual expenses		
Other attendances, per attendance	R 12-00	19-00	23-00
Necessary formal telephone calls, per call	R 12-00	19-00	23-00
Obtaining a certified copy of the award	R 60-00		
Where counsel is employed			
Instruction on arbitration	R 145-00	145-00	145-00
Drawing brief on arbitration (per 100 four letter words)	R 19-00	19-00	19-00
Copy of brief on arbitration (per page)	R 3-00	3-00	3-00
Attending each necessary consultation with counsel (per15 minutes or part thereof)	R 47-00	47-00	47-00
Counsel's fees			
Each necessary consultation (per 15 minutes or part thereof) unless a higher fee is allowed by the arbitrator in the award	R 117-00	117-00	117-00
Brief on arbitration for first day unless a higher fee is allowed by the arbitrator in the award	R1 640-00	1640-00	1640-00
Refresher for every other day (per day) unless a higher fee is allowed by the arbitrator in the award	R 985-00	985-00	985-00
Travelling allowance if allowed by arbitrator in cases where the arbitration is held more than 30 km from the nearest seat of the High Court, per km	R 3-00	3-00	3-00
Travelling time subject to rule 33(9) (per 15 minutes or part)	R 79-00	79-00	95-00
Notes in respect of all scales:			
If matter is settled, withdrawn or postponed-			
Not more than two days before hearing		Full daily fee	
Not less than three days and not more than seven days before the hearing		2/3 of daily fee	
Not less than eight days and not more than twenty one days prior to the hearing		½ of daily fee	
Taxation of Costs			
Drawing up bill of costs		5% of fees allowed	
Attending taxation:		5% of the total of the bill allowed	
Attending on review of taxation, per 15 minutes or part thereof		R 117-00	
Notice of application for review of taxation per 100 four letter words		R 19-00	
Copies for filing and serving, per page		R 3-00	
Service, per service		R 12-00	
Affidavit where necessary per 100 four letter words		R 19-00	
Copies for filing and serving, per page		R 3-00	
Service, per service		R 12-00	
Execution			
Issue warrant of execution		R 79-00	
For each re-issue		R 33-00	
Sheriff 's Fees			
In accordance with Sheriff's prescribed tariff.			

[1] See *Van den Berg v S.A. Police Service* (2005) 26 ILJ 1723 (LC) and *National Union of Mine Workers v East Rand Gold and Uranium Ltd* 1992 (1) SA 700 (A); (1991) 12 ILJ 1221 (A).

[2] The factors mentioned are not a *numerus clausus.*

[3] Rule 39 does not specify the manner in which Form 7.17 must be submitted, but it is suggested that it must be done in accordance with the provisions of rule 5.

[4] In practice the Case Management of the CCMA will set the taxation down and notify both parties of the set down date, time and place of the taxation.

[5] Rule 39 does not specify who is entitled to be present at the taxation, but it is suggested that taxation is an integral part of the arbitration process because the rights and obligations of the parties are not finally determined until the costs ordered have been taxed and therefore that only those who may appear at arbitration in terms of rule 25 may appear at taxation.

[6] A signed award must be obtained to verify this.

[7] The applicable tariff is Schedule A of the tariff prescribed in terms of the Magistrates' Court Act of 1944, unless the parties agreed to a different tariff.

[8] There is no provision in rule 39 that the request for taxation may simply be dismissed if the requesting party fails to attend, unless such party was also not present at the arbitration, in which case there would have been no need to even notify such party of the taxation (see Rule 39 (6)).

[9] Rule 39 also does not state that taxation may proceed on a default basis, but it is suggested that it may be argued that such party has waived its right to oppose the bill. If that is not the case, such party may simply frustrate the taxation proceedings *ad infinitum*.

[10] See powers of taxing officer in paragraph 18.13.

[11] An *allocatur* is a statement signed by the taxing officer certifying the amount at which the bill has been taxed. Normally the draft bill will have a statement to this effect which the taxing officer may sign and confirm it's authenticity by putting a CCMA stamp next to the signature of the taxing officer. It is advisable to initial and put a CCMA stamp on each and every page of the bill of costs. There is no need to give reasons for any ruling made, until there is a request to do so or the decision has been taken on review (see also par 18.14). It is only necessary to indicate that any particular item is allowed, disallowed or taxed down and if so, the extent to which it is taxed down. This must be done on the draft bill of costs. Normally the draft bill will have space to do so.

[12] It is important that the taxing officer checks the calculation on the draft bill and not simply accept it as correct.

[13] See also LAWSA, Vol 3, paras 887, 888 and 889. Although LAWSA refers to taxation in the High and Magistrates' Courts there is no reason in the LRA or the CCMA rules why the same approach should not be followed by CCMA taxing officers.

[14] Normally the review will be in respect of one or more items – not necessarily all items. In such cases it is only necessary to give reasons for the decision in respect of those items.

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?
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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?

19.1 What statutory provisions and rules govern the enforcement of settlement agreements and awards?

19.1.1 A party wishing to enforce an award has two options; to apply to the director of the CCMA or his/her delegate for the award to be certified as a final and binding award or to apply to the Labour Court for the award to be made an order of the Labour Court.[1]

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.[2]

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.[3]

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.[4]

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.[5] The CCMA does not have jurisdiction to make such settlement agreements awards.

19.1.8 In section 143 a distinction is drawn between an award for the payment of an amount of money, on the one hand, and an award ordering the performance of an act, other than the payment of an amount of money, on the other hand. Once certified, an award that orders the payment of an amount of money is to be enforced by writ of execution while an award ordering the performance of any other act, is to be enforced by way of contempt proceedings instituted in the Labour Court.[6]

19.1.9 Rule 40 regulates the manner in which applications for certifications of awards are to be made and the form in which writs of execution are to be issued.

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. In such cases the other party/parties should be given 14 days to respond.

19.2.6 The settlement agreement must have been entered into freely and voluntary.

19.2.7 The settlement agreement must be enforceable.[7]

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 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.

19.3.3 Upon receipt of application, the CCMA will issue a notice advising the other party of its rights to make representations in respect of the application. The party against whom enforcement is sought must be afforded 14 days within which to make written representations to the CCMA.

19.3.4 After 14 days the application including any representations made by the respondent, must be considered.

19.3.5 On good cause shown, the CCMA may decline to certify the arbitration award.

19.3.6 If no basis exists for entertaining any objection from the other party regarding the certification of the award, the award will generally be certified. The director or his/her delegate may however in exceptional circumstances exercise a discretion against certifying an award e.g. if the circumstances are such that it is desirable to leave the applicant to his/her/its contractual remedies.

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 sounding in money 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 Registrar of the Labour Court to issue a writ of execution.

19.4.2 Once the Registrar of the Labour Court has issued the writ, 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 The party in whose favour the award was granted must ensure that the other party is aware of the fact that the award was certified or made an order of the Labour Court and this can, *inter alia,* be done by serving a copy of the certificate or the Court order on such other party.

19.5.2 The other party must be required to comply with the certified award/order.

19.5.3 In cases of a failure to perform an act required in a certified award the applicant may, in terms of section 143 (4) of the LRA, enforce the award by way of contempt proceedings instituted in the Labour Court as such awards. In a case where the award was made an order of the Labour Court such order is also enforceable by way of contempt proceedings instituted in the Labour Court.

19.5.4 The contempt proceedings should be instituted by way of notice of application supported by a founding affidavit.

19.5.5 In the founding affidavit the applicant should show that[8]-

- An award was issued against the respondent and such award was certified (with the result that it has the effect of a Labour Court order) or that it was made an order of the Labour Court;
- 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 certified award or Court order;[9]
- The respondent was in wilful default and therefore in *mala fide* disobedience of the order.

19.5.6 The Labour Court will subpoena the party who had failed to comply with the certified award or Court order to appear before the Court.

19.5.7 In the absence of an acceptable explanation for the failure to comply with the certified award/ Court order 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.[10]

19.6 May an award be rescinded after certification/ after being made an order of Court?

19.6.1 The CCMA will still entertain a rescission application even after the award has been certified.

19.6.2 If the rescission is granted, a writ may not been issued. If a writ has already been issued, such writ may not be executed by the sheriff and the party against whom the writ was issued, may, if necessary, apply to the Labour Court to have the writ set aside.

19.6.3 If the Labour Court has made the award an order of Court the CCMA does not have jurisdiction to consider a rescission application in respect of such award until such time as the Court order has been rescinded.[11]

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 Prescription is interrupted by a referral. Once an award is issued, prescription recommences and the award must be certified 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 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 award.[12]

[1] *Nxumalo v Express Personnel Services* (unreported award in KNDB 13124-07 issued on 17 October 2010.

[2] 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.

[3] 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.

[4] 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.

[5] *Sivraj v Caspian Freight CC* (Case Nos: KZNRFBC 2390 and KZNRFBC 9092) See however *Molaba & others v Emfuleni Local Municipality [2009] JOL 23477 (LC)*.

[6] Section 143 (4)

[7] *Sivraj v Caspian Freight CC (supra)*

[8] *National Union of Mineworkers & others v BKH Mining Services CC trading as Dancarl Diamond Mine and others* (1999) 20 ILJ 85 (LC).

[9] In *Southey v Southey* 1907 E.D.C 133 at page 137 it was held that where most of the order has been complied with and the non-compliance is in respect of some minor matter only, the court will take the substantial compliance into account and will not commit for the minor non-compliance.

[10] *National Union of Mineworkers & others v BKH Mining Service CC trading as Dancarl Diamond Mine and others* (supra); *Bruckner v Department of Health & other* (Labour Court Case No: J1510/02).

[11] *Nxumalo v Express Personnel Services* (*supra*)

[12] See *POPCRU obo Sifuba v Commissioner of the South African Police Service & others* (2009) 30 *ILJ* 1309 (LC).

Chapter 20: Pre-dismissal arbitration

Contents

20.1 What is a pre-dismissal arbitration (PDA)?
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20.9 Is the arbitrator required to render a written award within a reasonable time?

20.1 What is a pre-dismissal arbitration (PDA)?

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 LRA and regulated by rule 34.[1]

20.2 Who can conduct a PDA and under what circumstances?

20.2.1 PDAs can be conducted by a council, an accredited agency or the Commission on request of an employer and with the consent of the employee, which may be specific or general.

20.2.1 Specific consent is only possible after the employee has been advised of the allegations concerning his/her conduct or capacity and with respect to a specific arbitration.

20.2.2 Employees who earn more than a prescribed minimum[2] can give a general consent to a pre-dismissal arbitration in their contracts of employment, i.e. before being appraised of the allegations of misconduct or incapacity.

20.2.3 The consent of an employee who earns less than the prescribed amount must be obtained every time that the employer desires to use the PDA procedure in respect of that employee.

20.3 What is the procedure to be followed by the employer before the CCMA can conduct a PDA?

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 a PDA;

20.3.3 If the employee has agreed in a contract of employment to a PDA, a copy of the contract must be attached to the prescribed form;

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 R3 000-00 for the first day and R2000-00 for every subsequent day. 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?

20.4.1 A pre-dismissal arbitration can only be conducted by agreement between the parties. The CCMA, council or agency will only appoint an arbitrator if the written consent of the employee party 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 PDAs 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 21 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 PDA and the name of the commissioner; and [3]
- ensure that the parties have at least 14 days notice of the PDA.

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 commissioners dealing with PDAs?

20.6.1 A PDA is an arbitration into allegations about the conduct or capacity of an employee.

20.6.2 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.

20.6.3 Every 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.

20.6.4 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).

20.6.5 Parties may agree on the documents to be handed in prior to the pre-dismissal hearing 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.[4]

20.6.6 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 Code of Good Practice: Dismissal.)

20.6.7 The arbitrator's award is final and binding 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 award 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 a PDA?

20.7.1 An employee party to the dispute may appear in person or be represented-

- by a co-employee;
- any member, office bearer or official of that party's registered trade union; or

- by a legal practitioner on agreement between the parties.

20.7.2 An employer party may be represented-

- by a director or employee of that party;
- if it is a close corporation, by a member thereof; or
- any member, office bearer or official of that party's registered employer's organisation; or
- by a legal practitioner on agreement between the parties.

20.8 What are the advantages and disadvantages of PDAs [5]

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;
- Pre-dismissal arbitration can be made a condition of employment for employees earning in excess of the amount determined by the Minister in terms of section 6 (3) of the BCEA; and
- 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, and the allocated arbitrator may not be a person in whom the parties have confidence; and
- The pre-dismissal arbitration process is one that both parties have to agree to and agreement can only be reached once the employee has been advised specifically of the allegations.

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.

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[1] See J Brand "Pre-Dismissal Arbitration: Obstacles and Opportunities. Brand explains –

"The first two are traditional forms of post-dismissal arbitration. This arbitration may either be conducted in the Commission for Conciliation, Mediation and Arbitration (the CCMA) in terms of the LRA or under a private arbitration agreement in terms of the Arbitration Act. Section 188A of the LRA has created a third option. It provides a statutory process for the arbitration of a dispute about a potential dismissal prior to the dismissal of the employee. The fourth and last option is a similar pre-dismissal arbitration process, but one which is conducted privately in terms of the Arbitration Act.

[2] 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 R149 376-00 per annum.

[3] The CSC must appoint the arbitrator.

[4] 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).*

[5] Based on a contribution by Alan Rycroft.

[6] Section 188A (9) provides that an arbitrator must "in the light of the evidence presented and by reference to the criteria for fairness in the Act, direct what action, if any, should be taken against the employee". This would include disciplinary steps or corrective steps or possibly the dismissal of the employee.

Chapter 21: Review of arbitration awards

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21.1 What is the difference between an appeal and a review?

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. They are however 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 wrongdoing[1].

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 material[2] and prevent a fair hearing[3].

21.4.2 The Labour Court has found the following to be a gross irregularity[4] –

- A refusal to grant postponement where postponement is appropriate;
- Conciliating a dispute at arbitration stage when both parties have not consented to the conciliation;
- A finding that the Commission has jurisdiction when in fact and law it does not;
- 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.

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 situations[5]-

- 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.

21.6 What does it mean to 'permit an award to be improperly obtained'?

21.6.1 A commissioner must not accept a bribe or any inducement from any party or person for any reason whatsoever.

21.7 When a party takes an award or ruling on review what steps are required of the applicant party?

21.7.1 Any party to a dispute may apply to the Labour Court for an order setting aside an arbitration award if a defect on the part of the arbitrating commissioner is alleged.

21.7.2 The Labour Court rules 7 and 7A, prescribe the process for applications in general, as well as a specific process for review applications.

21.7.3 The applicant party must apply to the Labour Court to set aside the award or ruling within six weeks of the date that the award or ruling was served on the applicant party. If the alleged defect (the reason for the review) involves corruption then the review application must be made within six weeks of the date that the applicant party discovers the corruption. The Labour Court may condone the late filing of an application for review.

21.7.4 The applicant party must serve the review application papers (in the form of a notice of motion and supporting affidavit/s) on all persons who have an interest in the application. As far as arbitration awards are concerned interested persons will be the commissioner who issued the award, the CCMA in the Province where the award was issued and other parties to the dispute.

21.7.5 The notice of motion must-

- call upon the Commission or the commissioner to explain why the decision or proceedings should not be reviewed and corrected or set aside;

- call upon the Commission or the commissioner to dispatch, within 10 days after receipt of the notice of motion, to the registrar of the Labour Court, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law to provide, and to notify the applicant party that this has been done; and

- be supported by an affidavit setting out the factual and legal grounds upon which the applicant party relies to have the decision of the commissioner or the proceedings corrected or set aside.

21.7.6 The applicant party must within ten days of receipt of the record from the Commission amend, add to or vary the terms of the notice of motion and supplement this with a supporting affidavit, or deliver a notice to the Commission and other parties that no amendment of the original notice of motion is intended and that it stands by its original notice of motion. A certified copy of the record and any reasons filed by any party, must accompany the notice. The costs of the transcription of the record must be paid by the applicant party and then become costs in the cause.

21.7.7 On receipt of the respondent party’s answering affidavit the applicant party may submit a replying affidavit within 5 days.

21.8 When a party takes an award or ruling on review what steps are required of the Commission in respect of the parties and the Labour Court?

21.8.1 Each Province must nominate an employee (referred to in this section as the review administrator), preferably the Registrar or the senior case management officer or a case management officer, to receive and process review applications on behalf of the Commission and the arbitrating commissioner.

21.8.2 Upon receipt of the review application, the review administrator must-

- Sign for the documents and state the time and date of receipt on the front page of the review application;
- Give the review application an internal review number and capture the particulars in the review register as well as on the system;
- Immediately draw the relevant case file and together with the review application place it on the convening senior commissioner's or delegated person's table for his or her consideration. The convening senior commissioner or delegate must consider-
    - the nature of the application;
    - the relief sought, in particular if a cost order is sought against the CCMA and / or the arbitrating commissioner;
    - whether there are personal allegations levelled against the arbitrating commissioner relating to irregular conduct such as fraud or dishonesty;

  and decide whether to oppose the review application;
- Notify the arbitrating commissioner of the review application and invite him / her to furnish additional reasons, if any, or to respond to any allegations raised. (It is not the function of the CCMA or the arbitrating commissioner to oppose the review application as it is not proper for the CCMA or the commissioner to become a party to the dispute. At times an explanatory affidavit may be necessary. It is the employer and employee parties who argue the merits of the award, and for the judge to decide whether the decision is justified or not);
- Prepare the following three notices to be filed in the Labour Court with the record-
    - A notice saying the record has been filed with the Labour Court, and listing the documents filed;

- A notice advising the applicant party that it must;
    - arrange with the Registrar of the Labour Court that a copy of the record is made available for each party, and that the copies are certified as true and correct;
    - furnish each party and the Registrar of the Labour Court with a copy of the record;
    - notify the Commission if it is persisting with a cost order against the Commission, and if so, informing it that the Commission will oppose such relief, and will ask for costs;
    - advise the Registrar whether it stands by the original notice of motion, or if it intends to amend that notice;
- A notice advising whether the arbitrating commissioner is filing additional reasons, and if the arbitrating commissioner is submitting additional reasons, to attach those reasons to the notice, stating that the Commission abides by the decision of the Labour Court but will oppose any costs order sought against the Commission. The convening senior commissioner or delegated person must sign the general documents while the arbitrating commissioner must sign the document relating to additional reasons.

- Prepare all documents in triplicate and together with the original documents and the record of the arbitration or hearing, file them with the Registrar of the Labour Court within 10 days of receipt of the review application. The Registrar must acknowledge receipt of the relevant documents on the Commission's copy. The record of the proceedings will include-
    - the tape cassette/s/CD used to record the arbitration proceedings mechanically;
    - the arbitrating commissioner's notes properly paginated if the proceedings were not mechanically recorded;
    - all documents used as exhibits in the hearing which must be all properly numbered;
    - any other document relevant to the particular review application;
- Arrange that the Registrar of the Labour Court provides the review administrator with its monthly and weekly court roll to ascertain when review applications are to be heard;

- Visit the Registrar's office on a monthly basis to update the court roll and to ascertain what review applications have been finalised, and the result;

- Capture the outcome of review applications on the review register and on the system;

- Prepare and furnish the National Senior Commissioner with a monthly report on the status of review proceedings in the province, i.e. recording new applications and capturing Labour Court findings;

- Within 10 days from the date of receipt of the amendment or notice to stand by the original notice of motion by the applicant party, oppose the application or file a notice to say that the Commission will abide the decision of the Labour Court, to avoid a costs order being made against it;

21.9 What findings can the Labour Court make on review?

21.9.1 The Labour Court may review any performance or purported performance of any function provided for in the LRA. If the applicant party is successful the Labour Court may determine the dispute in the manner it considers appropriate or make an order it considers appropriate to determine the dispute. Usually the Labour Court substitutes the commissioner's award for the order it considers appropriate, or refers the matter back to the Commission for rehearing before a different commissioner.

21.10 Does an application for review of a commissioner's ruling during an arbitration stay (stop) the arbitration proceedings pending the review?

21.10.1 The Labour Court may stay the enforcement of the award pending its decision.

21.10.2 If the applicant party wishes to stay the arbitration proceedings pending the review of a commissioner's ruling, the applicant party must make an application to the Labour Court for an interdict to stay the arbitration proceedings. The Labour Court seldom makes such a ruling, and takes a dim view of interlocutory applications, preferring that all irregularities be dealt with in one review on finalisation of the arbitration hearing.

21.11 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] See *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] These are examples and not a closed list.

Chapter 22: Contempt of the Commission

Contents

22.1 What constitutes contempt of the Commission?
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 Commission was committed?
22.4 What could be done to avoid / discourage contempt of the Commission?

22.1 What constitutes contempt of the commission?

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;
- if a person wilfully hinders a commissioner in performing any function conferred by or in terms of the Act;
- 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;

- by doing anything else in relation to the Commission 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.[2]

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.[3]

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 as far as possible give warnings that a finding of contempt would be considered if contemptuous conduct is persisted with and should as far as 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 Commission 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.

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 appear after being subpoenaed, as it is possible for the person to show that there was good cause for the failure;
- failing to produce a book, document or object, as it is possible that the person might show good cause for such failure;
- after having appeared in response to a subpoena, failing to remain in attendance, as the person concerned might be able to show good cause for the 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 Where the person concerned cannot be advised in person of the contempt proceedings, it may be advisable to adjourn the proceedings in order for him /her to be notified of the contempt proceedings and that further, he /she should show good cause at the next hearing. In certain instances the matter may be considered in the absence of that person, such as, where he/she fails to appear despite having been notified of the proceedings.

22.2.6 The proceedings must be recorded even if it arises during a conciliation process.

22.2.7 The person concerned should be permitted representation and this includes legal representation.

22.2.8 The commissioner's discretion to determine whether conduct amounts to contempt must be exercised with "caution and restraint."[4]

22.2.9 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 Commission.

22.2.10 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 Commission was committed?[5]

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 a notice of application, supported by a founding affidavit, which must, *inter alia,* indicate the relief sought and notify the respondent of its rights and obligations if it intends to oppose the relief sought. The record of proceedings and the commissioner's finding must be attached to the notice.

22.3.3 If the respondent wishes to oppose the relief sought it must file a notice of opposition and an answering affidavit setting out fully its defence.

22.3.4 The Registrar of the Labour Court must set the matter down for hearing and must subpoena the respondent to appear before the Labour Court on the date of the hearing.

22.3.5 The Labour Court may also subpoena any other person to appear before the Labour Court to be questioned about the contemptuous behaviour of the respondent.

22.3.6 The commissioner must attend the hearing to answer any questions that the Labour Court may possibly want to put to such commissioner but should be represented by a representative appointed by the CCMA.

22.3.7 At the hearing the Court will make a ruling whether to decide the matter on the papers or whether oral evidence should be heard.

22.3.8 The Labour Court will consider all the facts and circumstances of each case to determine whether the respondent was wilfully in contempt of the Commission. If the finding of contempt is confirmed, all relevant facts and circumstances prevailing at the time and relevant to the determination of an appropriate order will be considered.

22.3.9 The sanction that may 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 Commission?

22.4.1 Commissioners are expected to deal with matters where strong feelings and impassionate 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.[6]

22.4.2 Some instances of contempt of the Commission 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 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.

[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).

[2] Awards for the payment of money are enforced through writs of execution.

[3] See section 143 (4) read with section 143 (1) of the LRA.

[4] *National Bargaining Council for the Road Freight Industry v Myer t/a Oakley Carriers* [2002] 5 BLLR 604 (LC).

[5] See *Bargaining Council for the Clothing Manufacturing Industry & another v Prinsloo* [2007] 9 BLLR 825 (LC).

[6] *National Bargaining Council for the Road Freight Industry v Myer t/a Oakley Carriers (supra)* at 615.

Chapter 23: Facilitation of retrenchments in terms of section 189A of the LRA

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23.15 If section 189A applies, when may employees embark on a strike concerning a section 189 (3) notice?
23.16 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) deals 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 employee 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 that 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 the employees who such employer contemplates dismissing; and/or

23.3.3 Parties to an agreement to appoint a facilitator who include such employer.

23.4 How may facilitation be requested?

23.4.1 If the employer is to request the facilitation it must in its section 189 (3) notice request the facilitation.[3]

23.4.2 If the consulting party/parties representing the majority of the employees who the employer contemplates dismissing are to request the 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 CMA 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;
- proof of service on the other parties was attached to the request; and
- 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 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 appointed. Such facilitator must be available on the date of the first facilitation meeting.

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 at least be given 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] Not to do so would therefore be unlawful.

23.6.2 A registered trade union which has, or employees who have, received a section 189 (3) notice and elect not to refer a dispute about the fairness of the reason for the dismissals to the Labour Court for adjudication, may embark upon a protected strike concerning the proposed retrenchments if-

- the dispute was referred for conciliation; and
- a certificate was issued stating that the dispute remains unresolved, or the dispute remains unresolved for a period of 30 days since the referral (unless a longer period is agreed upon by the parties to the dispute); and
- the employer has issued notices of termination of employment; and
- 48 hours notice of such strike was given, (seven days in the case of a dispute where the State is the employer party).

To embark upon a strike when these requirements have not been met would be unlawful.

23.6.3 If a 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. In the light thereof that 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 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;

- 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 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 at the first facilitation meeting?

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 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]

23.7.4 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]

23.7.5 The commissioner must explain the procedure to the parties.

23.7.6 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]

23.7.7 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 are the powers and duties of the facilitator at subsequent facilitation meetings if no other agreement is reached between the parties?[13]

23.8.1 Deal with any matter referred to in paragraph 23.7 above;

23.8.2 Chair the meeting;

23.8.3 Decide any issue of procedure that arises in the course of meetings between the parties;

23.8.4 Arrange further facilitation meetings after consultation with the parties; and

23.8.5 Direct that the parties engage in consultations without the facilitator being present.

23.9 In respect of what specific procedural matters should the facilitator attempt to assist the parties to reach agreement?

23.9.1 The matters referred to in paragraph 23.7.1 above.

23.9.2 Functions the facilitator should perform mentioned in paragraph 23.8 above.

23.9.3 The number of facilitation meetings to be held subject to the limitations referred to in Regulation 6.

23.9.4 The stages of the facilitation to be conducted on a “with prejudice” basis and the stages to be conducted on a “without prejudice” basis.

23.10 What limitations are placed on the number of facilitation meetings that may be held?

23.10.1 In terms of Regulation 6 a facilitator must conduct up to four facilitation meetings unless the dispute is settled in a lesser number of meetings or unless the parties agree to a lesser number of meetings.

23.10.2 The Director, after consultation with the facilitator, may increase the number of meetings.

23.10.3 The four facilitation meetings referred to in paragraph 23.10.1, do not include meetings convened for the purposes of the facilitator arbitrating a dispute over the disclosure of information.

23.11 How should disputes concerning the disclosure of information be determined?

23.11.1 Regulation 5 envisages an informal arbitration 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.

23.11.2 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.[14]

23.11.3 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.[15] 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.[16]

23.11.4 Next, 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;
- 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.

23.11.5 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;[17]

- 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;[18]

- may order disclosure unconditionally or on terms designed to limit the harm likely to be caused to an employee or the employer; [19]

- 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.[20]

23.11.6 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.

23.12 How should the substantive issues generally be dealt with during a facilitation?

23.12.1 Each consulting party should at the outset be given an opportunity to indicate who they represent during the facilitation.

23.12.2 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.[21]

23.12.3 After the procedure to be followed during the facilitation was 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.

23.12.4 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.

23.12.5 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.

23.12.6 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.

23.12.7 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.

23.12.8 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.

23.12.9 The facilitator should act as a mediator and should assist the parties to reach consensus on as many issues as possible.

23.12.10 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.[22]

23.12.11 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.[23]

23.12.12 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.[24]

23.12.13 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.

23.12.14 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, e.g. an agreement whether employees-

- are entitled to embark on a protected strike and when such strike will commence; or

- whether dismissed employees are entitled to refer a dispute to the Labour Court or whether the parties consent to arbitration.

23.13. What are the duties of the facilitator at the end of the facilitation?

23.13.1 Although it is not a statutory requirement, a facilitator should at the conclusion of the facilitation process, issue an outcome report indicating that a facilitation was conducted in accordance with the provisions of section 189A of the LRA and the regulations and indicating whether the matter was resolved or whether it remained unresolved.

23.13.2 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 and of the consequences of making such election as set out in section 189A (10).

23.13.3 Parties should be encouraged to continue with efforts to resolve the matter by agreement without delaying the statutory dispute resolution processes.

23.14 **If section 189A applies, when is it possible for an employer party to give lawful notice of termination of employment?**

23.14.1 If a facilitator is appointed, a period of 60 days calculated from the date of the section 189(3) notice must have expired.[25]

23.14.2 If a facilitator is not appointed, the period envisaged by section 64 (1) (a) must have elapsed.[26] This means that the employer must at least wait for a period of 30 days to enable the union or the employees to refer a dispute about the section 189(3) notice to the CCMA for conciliation.[27] If the union or the employees refers a dispute about the section 189 (3) notice for conciliation, the employer must wait for the expiry of a further period of 30 days from

date of the referral or until a certificate of non-resolution was issued.

23.15 If section 189A applies, when may employees embark on a strike concerning a section 189 (3) notice?

23.15.1 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 such notice of termination of employment.[28] 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 189 (3) notice had not expired, if the employer dismisses or gives notice of dismissal within the said 60 day period.[29]

23.15.2 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.

23.15.3 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.

23.16 What are the consequences of electing to strike?

23.16.1 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.

23.16.2 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.

[1] Section 189A (1).
[2] Section 189A (3) and (4).
[3] Section 189A (3) (a).
[4] Section 189 A (3) (b).
[5] Section 189A (2) (a).
[6] Section 189A (8).
[7] Section 189 A (7).
[8] Section 189A (9).
[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.
[13] Regulation 3 (2) read with regulation 4 (1).
[14] Regulation 5 (2) indicates that sections 16 (6) to (9) of the LRA do not apply.
[15] Section 16 (10).
[16] Section 189 (4).
[17] Section 16 (11.
[18] Section 16 (12).
[19] Section 16 (12).
[20] Section 16 (13).
[21] Section 189 (2).
[22] Section 189 (5).
[23] Section 189 (6).
[24] Section 189 (7).
[25] Section 189A (7) (a).
[26] Section 189A (8) (b).
[27] See section 189A (8) (a).
[28] Section 189A(7)(b).
[29] 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?

24.1 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 the dispute through conciliation in specified circumstances where it would not otherwise have had jurisdiction to conciliate.

24.1.2 Three categories of disputes are dealt with in the section namely-

- disputes that were never referred to the CCMA[1];
- disputes that were referred to the CCMA or a bargaining council and in respect of which a certificate had already been issued that it remained unresolved;[2]
- disputes that were referred to the CCMA or a bargaining council and where 30 days had already expired since the referral.[3]

24.2 Under what circumstances may the CCMA intervene in disputes that have not been referred to it?

24.2.1 The CCMA may appoint a commissioner to attempt to resolve such disputes through conciliation if-

- the resolution of the dispute would be in the public interest;[4] and
- all the parties to the dispute consent to the appointment of the commissioner.

24.2.2 In cases where a party embarks upon a strike or lock-out without having referred the dispute for conciliation the CCMA may offer to 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 to the appointment of a commissioner to attempt to resolve the dispute through conciliation. In cases where a protected strike or lock-out had already commenced, the CCMA may offer to appoint a commissioner to conciliate the dispute in terms of these provisions.

24.4 Who may authorise a section 150 intervention?

24.4.1 In the case of a national dispute, e.g. where the dispute exists in numerous branches of a national company in different provinces, the intervention must be authorised by the Director or the National Senior Commissioner: Mediation.

24.4.2 Where a dispute is limited to a province, the mediation commissioner in consultation with the senior convening commissioner of the province may authorise the intervention.

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[1] Section 150 (1).
[2] Section 150 (2) (a).
[3] Section 150 (2) (b).
[4] In *Saloojee v McKenzie NO & others* [2005] 3 BLLR 285 (LC); (2005) 26 *ILJ* 330 (LC), the court held that the phrase 'in the public interest' must be interpreted in the context of the legislation in which it occurs, but generally means that the public will be better served by the decision concerned.

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 required[1] to keep a record of-

- any evidence given in an arbitration hearing;
- any sworn testimony given in any proceedings before the Commission; 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 should also reflect matters such as-

- 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 CCMA

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 The record button serves a dual purpose, i.e. to record and to pause. To record, the power button must be pressed once.To pause, the power button must be pressed once while the recording is being done. To continue with the recording, the record button must be pressed again. To stop the recording the stop button must be pressed.

25.3.5 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.

25.3.6 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.

25.3.7 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.

25.3.8 Downloading is done by taking the recorder to the designated CMO. The CMO connects the recorder to the computer system. The CMO then listens to the recording to identify the case number and the date of the hearing. A file is then created reflecting the case number and the date. The recording is downloaded to the file and the file is saved on the server in a folder created for the commissioner.

25.3.9 As proof that the recording was downloaded the case number and date of hearing must be entered into the prescribed register and signed by the commissioner and the CMO.

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.

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 other mechanical means[2] or digital recording used by the commissioner. Where such record is missing or incomplete the record must be reconstructed.

25.6.3 The reconstruction process includes the following-

- The commissioner and the representatives come together, bringing their extant notes and such other documentation as may be relevant.

- They then endeavour to reconstruct a record of the proceedings, to the best of their ability and recollection and as fully and accurately as the circumstances allow.

- This is then placed before the relevant court with such reservations as the participants may wish to note[3].

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[1] *Ndlovu v CCMA Commissioner Mullins* [1999] 3 BLLR 231 (LC) and CCMA Rule 36.

[2] *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 931 (LAC).

[3] See the *Lifecare* case.

Chapter 26 – Demarcations

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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]

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 CCMA.[4]

26.2.2 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).

26.2.3 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]

26.3.3 Where the Labour Court or an arbitrator refers a demarcation dispute to the CCMA the Director or her delegate, the NSC: Dispute Resolution, 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 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 province or the person delegated by him to administer demarcation disputes.

26.7.3 The CSC or the person delegated by him must immediately inform NSC: Dispute Resolution of the dispute by sending an e-mail setting out the details of the parties and a brief summary of the dispute. Head Office may request further information if necessary.

26.7.4 NSC: Dispute Resolution will then appoint a commissioner to hear the dispute whereafter the matter must be set down for hearing in the province, unless otherwise directed by the NSC: Dispute Resolution.

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 commissioner appointed to hear the matter, 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 CCMA 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 CCMA rule 20, in so far 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 other public institutions;

- whether the final determination can be made on the papers filed and the written submissions by the parties, without a further hearing.

26.9.2 All rulings made at the *in limine* proceedings or thereafter must be reduced to writing and submitted to the provincial office.The provincial office must capture the rulings and serve them 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 provincial 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: Dispute Resolution, 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: Dispute Resolution 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: Dispute Resolution 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: Dispute Resolution 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 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.

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 Head Office 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 provincial office of the CCMA within 14 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 NSC: Dispute Resolution.[12]

26.13.8 The Director will 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 NSC: Dispute Resolution for 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: Dispute Resolution 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, which incorporates its constitution.)

26.14.2 The following approaches have been adopted over the years-

- 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. Once the character of the industry is determined, all employees are deemed to be engaged in that industry.[14]

- 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.[15]

- 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 both industries. 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.[16]

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[1] Section 62(1) of the LRA.
[2] Section 213 of the LRA.
[3] Section 213 of the LRA.
[4] Section 62 (1) of the LRA.
[5] Section 62(3), (3A) and (5) of the LRA.
[6] Section 62 (5) read with section 62(6) of the LRA.
[7] Section 62 (4) of the LRA.
[8] Section 62 (8) of the LRA.
[9] Section 62 (7) of the LRA.
[10] Section 62 (4) and (6) of the LRA.
[11] Section 62 (9) of the LRA.
[12] Section 62 (10) of the LRA.
[13] See also *Labour Relations Law – A Comprehensive Guide*, 5th Ed by Du Toit at p 30.
[14] See *Coin Security (Pty) Ltd v CCMA & others* [2005] 7 BLLR 672 (LC) at pars 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.
[15] See *CWIU & others v Smith & Nephew Limited* [1997] 9 BLLR 1240 (CCMA).
[16] See *Ko-operatiewe Wynbouersverening (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; 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 strike.[21] 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

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 Court[3] 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).
-

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 Carephone[4] test applies to the commissioner's decision, in other words, the decision must be justifiable in relation to the reasons given for it.

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).

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;
- 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.

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[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] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2007] 5 BLLR 473 (LC).
[4] *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 (LAC).

Chapter 28 - Diplomatic and Consular Missions, International Agencies and their Representatives

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28.1 Immunity of foreign states and international organisations
28.2 The concepts: diplomatic immunity, functional immunity and inviolability
28.3 The agreed procedure for dealing with mission/ international agency cases
28.4 Enforcement of arbitration awards
28.5 List of international agencies
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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 entered into in the Republic or the work had to be performed wholly or partly in the Republic; and

- At the time when the contract was entered into, 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. CCMA Tshwane 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: CCMA Tshwane 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, the CCMA 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 Branch: State Protocol of the Department of Foreign Affairs.
- The Branch: State Protocol 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 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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