

SEPTEMBER 2023

”

**“WITH KNOWLEDGE COMES
WISDOM, AND WITH WISDOM,
READINESS.”**

BROUGHT TO YOU

BY **CEO**

CCMA RULES

AND NEW CHANGES



***IN AN IDEAL SCENARIO,
CONFLICTS WOULD SIMPLY
DISSOLVE, WITHOUT NEGATIVE
REPERCUSSIONS FOR EITHER
THE INDIVIDUALS INVOLVED
OR THE BUSINESSES THEY
REPRESENT.***

WE HOPE THIS GUIDE WILL EMPOWER YOU WITH KNOWLEDGE AND OFFER A ROADMAP TO NAVIGATE THE INTRICATE MINEFIELD OF UNAVOIDABLE DISAGREEMENTS - SITUATIONS THAT NECESSITATE INFORMED STRATEGIES.

Dear Reader,

The commonsensical adage, “the only way to get the best of an argument is to avoid it,” is not always feasible advice for business owners, particularly within the ever-changing landscape of South Africa’s professional environment. In an ideal scenario, conflicts would simply dissolve, without negative repercussions for either the individuals involved or the businesses they represent. Unfortunately, the reality is often quite different.

When sidestepping an argument isn’t always the optimal solution, and challenges are to be addressed head-on effectively, the CCMA is one of the available statutory bodies designed to help resolve and mediate workplace conflicts. But its rules and processes are complex, meaning that business owners who understand the CCMA rules and how to apply them correctly have an immediate advantage in

the conflict resolution process. The notion “to be forewarned is to be forearmed” springs to mind.

Recently, the CCMA Rules have been amended. So, drawing on the collective wisdom of our team, we have created this guidebook with the aim of helping business owners navigate the intricate realm of inevitable disputes – and equipping you with essential insights on the application of the current and amended CCMA procedures.

We hope this Guide will empower you with knowledge and offer a roadmap to navigate the intricate minefield of unavoidable disagreements - situations that necessitate informed strategies. This resource should serve as an empowering tool for employers managing their employee-employer relationships. But, in the end, it is also down to who you know in striving for successful outcomes, and the

CEO team remains your partner in overcoming the challenges and threats to your business caused by unavoidable disputes.

I also want to say a special thank you to Jaundré, Stephen, Carl, Tiaan and Daniel for your help in putting this booklet together.

Happy reading.

Annelien Breed

EXECUTIVE DIRECTOR

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SUMMARY OF CHANGES

The much-anticipated amendments to CCMA Rules have been gazetted and became effective on 24 April 2023. Various considerations have driven the amendments, namely:

- The implementation of the Protection of Personal Information Act 4 of 2013 (POPIA).
- Administrative considerations by the CCMA in implementing its Rules.
- Recent case law development that influences the CCMA and its Rules.
- Accommodating an online and virtual service delivery approach.

For reference, these amendments have affected the following CCMA Rules:

SERVING AND FILING OF DOCUMENTS

Rule 1 – How to contact the Commission

Rule 2(1) & Rule 2(3) – When are the offices of the Commission open

Rule 3 – How to calculate time periods in these Rules

Rule 4 – Who must sign documents

Rule 5(4) – How to serve documents on other parties

Rule 7 – How to file documents with the Commission

Rule 9(1) & Rule 9(2) – How to seek condonation for referral documents and applications delivered late

CONCILIATION OF DISPUTES

Rule 10 & Rule 10(3) – How to refer a dispute to the Commission for Conciliation

Rule 13 & Rule 13(1A) – What happens if a party fails to attend at Conciliation

ARBITRATIONS

Rule 18 – How to refer a request for Arbitration to the Commission

Rule 23 – How to postpone an Arbitration

RULES THAT APPLY TO CONCILIATIONS, ARBITRATIONS, CON-ARBS AND OTHER PROCESSES

Rule 24 – Where a hearing will take place

Rule 29 – Disclosure of documents or material related to the dispute

Rule 30 – What happens if a party fails to attend Arbitration proceedings before the Commission

APPLICATIONS

Rule 31 – How to bring an application

Rule 31C – Request to have a matter re-enrolled

Rule 32 – How to apply to vary or rescind Arbitration awards or rulings

INQUIRY IN TERMS OF SECTION 118A

Rule 34 – How to request an inquiry in terms of Section 188A of the Act

GENERAL

Rule 37 – How to have a subpoena issued and served to secure the presence of a person

Rule 40A – Payment of an Arbitration fee ordered in terms of Section 140 of the Act

Rule 41 – What words mean in these Rules

There have also been various amendments to many LRA Forms.

Navigating the legal landscape can be daunting, especially with the constant changes within the labour sphere. As always, CEO remains committed to providing Members with the latest information and labour law developments on matters that affect their businesses.

THIS GUIDELINE STARTS OFF WITH A VERY BASIC AND EASY TO UNDERSTAND RULE, NAMELY, **HOW TO CONTACT THE CCMA.**

RUAAN HEUNIS

This guideline starts off with a very basic and easy to understand rule, namely, how to contact the CCMA.

RULE ONE merely states that: "The addresses, telephone numbers and email addresses of the offices of the Commission are listed in Schedule One to these rules."

This rule has recently been amended by the inclusion of Rule 1 A that stipulates that a party who serves a document on the Commission or another party is responsible for complying with Data Protection Legislation including but not limited to the POPIA Act.

When for example a matter is scheduled in Johannesburg, the Commission can be contacted in the following manner:

Tel: 011 220 5000 or Email: johannesburg@ccma.org.za

One merely needs to go to Schedule One and find the contact details of the relevant CCMA office. In addition to that the CCMA Case Manager's email address will be at the bottom of any set down and could also be contacted.

CEO dispute resolution officials spend most of their time at the CCMA, should you need to contact the CCMA urgently, it is worthwhile to reach out to one of our dispute resolutions officials or administrative staff members. ▪

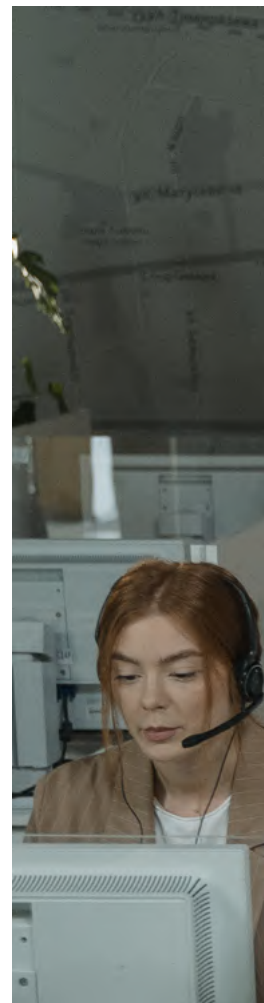
RULE TWO

KEANU WARD

Do you want to refer a matter to the CCMA? When are the offices of the Commission open? This is the information you will need.

According to Rule 2 of the CCMA rules the offices of the Commission will be open every day from Monday to Friday, excluding public holidays, from 08:30 until 16:30, or as determined by the Commission. In addition, documents may be filed with the Commission during the hours referred to above.

Lastly, documents may be e-mailed or referred using the official Commission electronic referral online portals. This may be referred at any time and on any day of the week to the Commission. ▪





MARTELEEN LINDEMANN



How to calculate time periods in these Rules:

(1) For the purpose of calculating any period of time in terms of these Rules-

- a. Day means a calendar day; and
- b. the first day is excluded and the last day is included, subject to sub-rule (2).

(2) The last day of any period must be excluded if it falls on a Saturday, Sunday or public holiday and will be the first working day following the Sunday or public holiday.

(3) Sub-rule 2 will apply, unless clearly indicated otherwise in terms of these Rules or applicable legislation.

Practical Example:

Timeframes are very important when it comes to the filing of applications and or notices with the CCMA. If you receive a notice of a hearing on Monday, and you have 7 (seven) days to file an application/notice prior to the date of the hearing the period will be calculated as follows:

Monday will be excluded as per Rule 3(1). Your first day starts on Tuesday and your last day (which will be the 7th day) will be on the next Monday. However, if the 7th day falls on a Sunday or a public holiday, your last day will be on the following working day, which in this case will be Monday. ▀



SEALING & SERVING: THE NEW AGE OF DOCUMENTS

“It is important to note that a signature includes an electronic signature, including an electronic referral made through the Commission’s online referral portal.”

CHRIS PIO

RULE FOUR sets out in detail who must sign documents for parties in CCMA proceedings; this includes persons who are entitled to represent a party, persons who are not entitled to represent a party, who signs the document if there are more than one employee and electronic referrals made through the Commission’s electronic referral online portals.

A document that a party must sign in terms of the Labour Relations Act 1995 (Act 66 of 1995) or these Rules, can either be signed by the party themselves or by any person entitled in terms of the Labour Relations Act or Rule 25 to represent that party in the proceedings.

Where a document has not been signed or was not signed by a person who is not entitled to represent that party in terms of the Labour Relations Act or these Rules, the intention of that party to submit that document may be confirmed by the subsequent appearance of the party at the convened proceedings before the commissioner or by any other method of confirmation that may be placed on record at the Commission.

If proceedings are jointly instituted or opposed by more than one employee, the documents may be signed by an employee the other employees mandate to sign. A list must be provided in writing containing

the names of the employees who have mandated the employee to sign on their behalf and must be attached to the referral document.

It is important to note that a signature includes an electronic signature, including an electronic referral made through the Commission’s online referral portal. ▪

RULE FIVE

SHARICE NAICKER

When it comes to CCMA rules, one can see that these rules may in some instances be difficult to understand, and that is where the Consolidated Employers Organisation (CEO) steps in. CEO is here to help employers in every way that it counts, and that is why we are going to set out a simple way for all employers to understand these rules. In this section we are going to look at Rule 5 of the CCMA rules. This sets out the way in which a document must be served on the other party.

To start off, Rule 5(1) sets out the primary way a party must



serve documents on another party. Firstly, the document can be served on another party by handing a copy of that document to the person concerned. Secondly, the document could also be handed to the representative authorised in writing to accept services on behalf of the person. Thirdly, the document could be handed to a person who is at least sixteen (16) years old and in charge of that person's place of residence, business, place of employment premises at the time of the handover. Finally, the document could be served to the person who is identified below.

Another primary way of serving a document on another party is by leaving a copy of the document at the address, which was chosen by the other party, at any location that is in accordance with subrule (3). The documents can be served through electronic means as well. Now the CCMA provides that a document can be served on another person through email, fax, or by telefaxing a copy of the document to the other party's email, fax or telefax number, or by sending the document to the

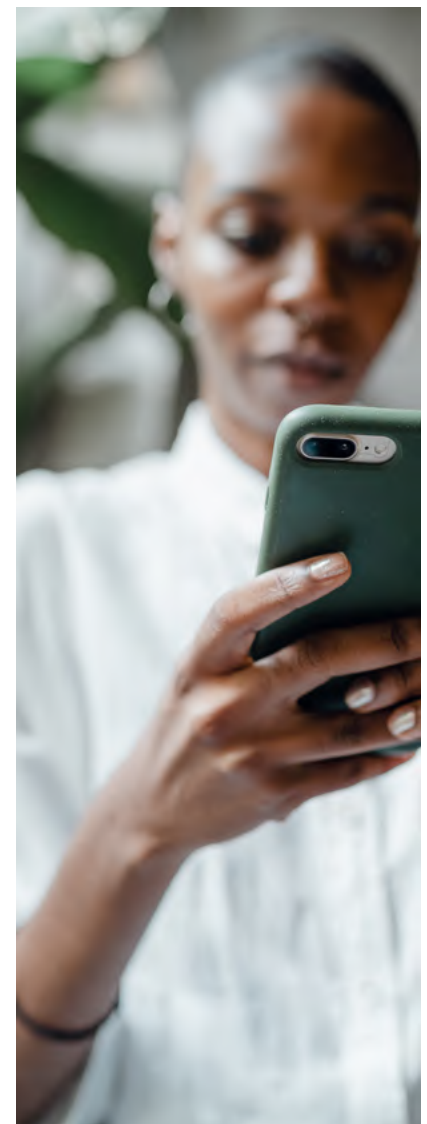
email address, fax number or telefax number chosen by the other party. The final primary way to serve a document to another person is by sending a copy of the respective document through registered post or by telegram to the last-known address of the other party, or the address which was chosen by the other party. Rule 5(2) of the CCMA rules also sets out the manner in which a document can be served onto a company, body corporate, trade union, employers organisation, partnership, firm or association, municipality, statutory body, state or province. In most of these instances, the documents ought to be served to a responsible employee or an official who works

“Social media has become a crucial part of people’s daily lives, and our law should be growing with the norms of social media as well.”

at one of these juristic persons. Now Rule 5(3) is not like the others, as it does not stand on its own, meaning that according to Rule 5(3), if no other person identified in subrule (2) is willing to accept service then service may be effective by attaching a copy of the document to the main door of the premises concerned; or if this is not accessible, a post-box or other places to which the public has access. Finally Rule 5(4) states that the commissioner has the authority to order service in a manner other than prescribed in this Rule.

Building on Rule 5(4) one can see that there are more ways of serving documents to the CCMA and applicants. A good instance of this comes from the experience of a CEO Official, who had requested permission from the commissioner to send the commissioner documents over the social media platform of WhatsApp, the commissioner

had agreed to this, and the matter went on. Social media has become a crucial part of people's daily lives, and our law should be growing with the norms of social media as well. By this I mean that the law should develop to such an extent as to all documents should be allowed to be served to Commissioners and Applicant through platforms such as WhatsApp or Telegram, provided that the WhatsApp or Telegram number is the number that appears on the CCMA 7.11 or 7.13 document. We must however state that this is not yet a confirmed form of service. Therefore, in conclusion, one can see that there are many ways available of serving a document on the other party, and hopefully in time our law develops to include service through social media. ▪



“A PARTY MUST PROVE THAT A DOCUMENT HAS BEEN SERVED SUCCESSFULLY IN ONE OF THE FOLLOWING MANNERS: BY REGISTERED MAIL, TELEGRAM OR TELEX, BY HAND, OR BY EMAIL.”

— **Rule Six**

CHRISTIE DE VILLIERS

Rule 6 of the CCMA rules gives the directive to parties in a dispute on how to satisfy the Commission that the documentation was served on the other party in the dispute.

A party must prove that a document has been served successfully in one of the following manners:

1. By presenting a copy of proof that the document has been mailed to the opposing party by registered mail. Out of a practical point of view, the party presenting the registered mail slip to the Commission does not necessarily have to prove that the other party has collected the registered post document, however, the registration slip must be attached to the document with the correct address on, which has been indicated as the other parties preferred address of service.

2. The second manner of service to another party is by telegram or telex. It must be proven to the Commission that the document has been sent to the other party in its entirety using a telegram, short message service (SMS), or any other means of communication that includes a phone line. The proof of the message should be attached to the documentation that is submitted to the Commission.

3. Documentation can also be served by hand. Should the documentation be served in person, the person who received the documentation signs a copy of the document by indicating their name, designation of the recipient, the place, time, and date of service. A statement from the person who delivered the document can also be submitted as proof that they delivered the document or left the document at the premises.

4. A document can also be served by email. A copy of the email that was sent to the other party must be submitted along with proof that it was delivered. It is always important that, practically, when the email is sent to the opposing party, the delivery report option and the read receipt option are selected when sending the email and that the proof be submitted to the Commission.

If the proof that the document has been served on the other party has been submitted, the Commission or the Commissioner will presume that the other party received the documentation and are aware of the contents of the documentation, unless proven otherwise.

A Commission will also accept proof of service in another manner other than prescribed in this rule. In essence, if a party can satisfy the Commission that the documents were served by WhatsApp, Facebook Messenger (with proof that it is the correct person), Instagram, or Courier. The service must be in a manner that will satisfy the Commissioner that the other party has received the document as sufficient. This may vary from Commissioner to Commissioner. ■



“A significant amendment throughout the rules is the removal of fax as an accepted form of filing. Rule 2(3) and Rule 7(2) have been amended to reflect this change.

The CCMA’s official electronic referral online portals are now the preferred method for communication.”

RULE SEVEN ———>

MOTHEO MOATSHE



Rule 7 provides ways in which documents can be filed with the CCMA, by documents we make reference to the initial 7.11 referral form, 7.13 (arbitration form), condonation applications, recession applications and any other documentation.

The Following are the accepted mechanisms to be used on filing any document at the commission: A party must file documents with the Commission -

- a) By hand delivery of the document to the regional office of the Commission or the office of the Department of Employment and Labour at the addresses listed in Schedule one;
- b) By sending a copy of the document by registered post to the regional office of the Commission at the address listed in Schedule one; or
- c) By emailing the document to

a Commission regional office at only an email address listed in Schedule one. Documents filed by means of email must be transmitted in MS Word or PDF format.

A document is filed with the Commission when -

- a) The document is handed to the regional office of the Commission, or an office of the Department of Employment and Labour listed in Schedule one.
- b) A document sent by registered post is received or presumed to be received as provided for in Rule 8 by an office of the Commission listed in Schedule one.
- c) The email is received in the regional office as provided for in the Electronic Communications and Transactions Act 25 of 2002; or
- d) As listed in schedule one, The

online referral or condonation application is received through the Commissions electronic referral online portals.

A party must only file original of a document, 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 (7) days of the request.

The use of fax machines has slowly becoming redundant as a means of communication in our personal lives which is now evident in the updated CCMA rules. The commission has canceled out communication by means of fax. It is important that employers also take this recent change into consideration, if any document has to be filed with the CCMA, fax machine will not be allowed, and your application will not be accepted. •

YOU'VE GOT REGISTERED MAIL

ANERIKE FAASEN

RULE EIGHT

Rule 8 deals with service via registered mail and reads as follows:

“Any document or notice sent by registered post by a party or the Commission is presumed, until the contrary is proved, to have been received by the person to whom it was sent seven (7) days after it was posted.”

Let's look at a practical example of this. Employee X has lodged a formal complaint against his employer, Employer Y, with the CCMA. As part of the dispute resolution process, both parties are required to exchange important documents and notices. According to Rule 8 of the CCMA, if either party or the Commission sends a document or notice by registered post, there is a legal presumption regarding its receipt. The rule states that the document or notice is presumed, unless proven otherwise, to have been received by the intended

“Any document or notice sent by registered post by a party or the Commission is presumed, until the contrary is proved, to have been received by the person to whom it was sent seven (7) days after it was posted.”

recipient seven (7) days after it was posted.

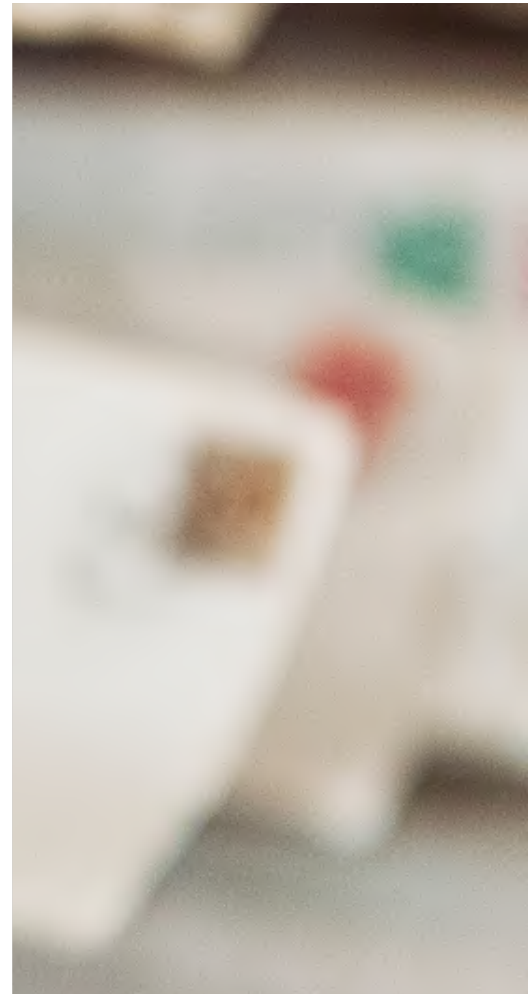
In this case, if the CCMA or Employer Y sends a document or notice related to the dispute to Employee X via registered post, the document is considered to have been officially delivered to him after seven (7) days from the date of posting. This presumption holds, unless Employee X can provide evidence to prove that he did not receive the document within that timeframe.

For example, if the CCMA sends a notice of the date, time, and location of a scheduled case between Employee X and Employer Y by registered post on the 1st of June, it is presumed that Employee X received the notice on the 8th of June. If Employee X claims that he did not receive the notice until the 10th of June, he would need to present evidence to dispute the presumption, such as a proof

of delayed mail delivery or any other compelling factors.

This rule helps establish a clear timeline for document delivery and ensures that parties have a reasonable period to respond or take appropriate action. It also allows for a standard and reliable method of communication between the parties involved in the dispute and the CCMA.

It is important to note that the presumption of receipt after seven (7) days applies specifically to documents and notices sent by registered post. If parties choose alternative methods of communication, such as email or hand delivery, the presumption of receipt may not apply, and other rules or practices regarding proof of delivery will come into play. ▪



TIME'S UP? NOT ALWAYS...

9

ARLENE JACOBS

Rule 9 reads as follows after the recent amendments: How to seek condonation for documents delivered late:

(1) This Rule applies to any referral document or application delivered outside of the applicable time period prescribed in the Act or these Rules.

(2) A party must apply for condonation, in terms of Rule 31.

(2A) Condonation may also be applied for using the official Commission electronic referral online portals as included in Scheduled One.

(3) An application for condonation must set out the grounds for seeking condonation and must include details of the following:

- (a) the degree of lateness;
- (b) the reasons for the lateness;
- (c) the referring parties' prospects of succeeding with the referral or application and obtaining the relief sought against the other party;
- (d) any prejudice to the other party; and
- (e) any other relevant factors.

(4) The Commission may assist a referring party to comply with this Rule.

Let's consider a scenario involving an employee, Jane, who believes she has been unfairly dismissed by her employer, XYZ Corporation. In accordance with the rules of the Commission for Conciliation, Mediation, and Arbitration (CCMA), Jane is required to submit a referral document to initiate a dispute resolution process within a specific time period prescribed by the Act and the CCMA Rules. In this scenario, she will need to submit the referral document within thirty (30) days.

However, due to unforeseen circumstances, Jane misses the deadline for submitting her referral

document. Realising her mistake, Jane decides to seek condonation for delivering the document late, as outlined in Rule 9 of the CCMA.

To apply for condonation, Jane must submit a request to the Commission, explaining the reasons for the late delivery of the document. She can either follow the traditional route by submitting a written application for condonation in accordance with Rule 31, or she may choose to utilise the official Commission electronic referral online portals mentioned in Schedule One, where condonation can also be applied for.

In her application for condonation, Jane must provide specific details as required by the CCMA rules. This includes:

- (a) The degree of lateness: Jane needs to indicate the exact amount of time by which she missed the prescribed deadline.
- (b) The reasons for the lateness: Jane should provide



When the clock ticks past your deadline, Rule 9 opens a door to justice. It guides you through the complex process of seeking condonation for late documents, ensuring fairness and understanding in unforeseen circumstances.

a clear and detailed explanation of why she failed to deliver the referral document within the required timeframe. For example, she might mention that she was hospitalised during the deadline period due to a medical emergency.

(c) The referring parties' prospects of success: Jane needs to outline her chances of success in the referral or application and her likelihood of obtaining the desired relief against XYZ Corporation. This could involve citing evidence, legal arguments, or precedents that support her case.

(d) Prejudice to the other party: Jane should address whether the late delivery of the referral document would cause any harm or disadvantage to XYZ Corporation. For instance, she can argue that the delay does not significantly prejudice the employer as they are aware of the dismissal claim and have access to relevant information.

(e) Any other relevant factors: Jane has the opportunity to mention any additional factors that may be relevant to her application for condonation, such as her good faith in pursuing the claim or any extenuating circumstances beyond her control.

The CCMA, as stated in the rule, may aid Jane in complying with Rule 9. This means that if Jane requires guidance or clarification on how to properly seek

condonation, she can reach out to the Commission for support.

By providing this process for seeking condonation, the CCMA aims to ensure fairness and access to justice for parties involved in labour disputes, allowing for exceptional circumstances where a referral document or application is delivered late to be considered on its merits.

It should also be noted that XYZ Corporation will have an opportunity to oppose Jane's Applications for Condonation in terms of Rule 31 (3)(e). ▪

Statistically, only 2% of referrals require a Condonation Application.

FINDING COMMON GROUND: THE PATH TO CONCILIATION THROUGH **RULE 10**

CARLENE VAN DER LITH

There is a dispute between an Employer and an Employee. Maybe it is a dismissal, perhaps an unfair labour practice, the list goes on. No consensus can be reached, and a third party is required to get involved and assist the process. The Commissioner at the CCMA will first attempt to resolve any dispute through conciliation. For this to take place, the matter will need to be referred to the CCMA. What steps should be taken in this regard?

Rule 10 of the CCMA rules explains the requirements to refer a dispute to the CCMA for conciliation.

- A referring party must complete a 7.11 form. This can also be done on the CCMA online portal. In this form, the Applicant referring the dispute must specify among others, the date that the dispute arose and the nature of the dispute namely, dismissal, discrimination, unfair labour practice, retrenchment, and constructive dismissal to name a few. A summary of the dispute must be provided as well as the relief sought, in other words, the means by which the matter may be resolved. The services of an interpreter can also be requested on the 7.11 form. The referring party, as well as the opposing parties' details, must accurately be completed on the form, as this is how the CCMA will send all further correspondence.

Should this form, for some reason, not be completed correctly, the Applicants referral may be deemed as defective, and the matter will be rejected. The 7.11 document is thus very important.

- If the referring party uses any means other than the online portal to refer the matter, the 7.11 referral document must be accompanied by written proof that the 7.11 was served on the opposing party, namely a fax report, email confirmation, signature of acceptance or perhaps postage. If the matter is scheduled by the CCMA and the responding party can prove that the matter was never served on them in the form of the 7.11 the matter will not be able to proceed.
- The CCMA rules also stipulate timeframes in which disputes may be referred to the CCMA. A dismissal, for example, is thirty (30) days from the date of dismissal. Should the referral be submitted after the 30-day period has expired, the referring party



will need to complete and attach a condonation application explaining and providing reasons for the lateness. The condonation outcome can then be determined on written submissions or at a hearing; this needs to be done before the case is accepted by the CCMA.

If the abovementioned rule is followed, the Applicant will have properly referred their dispute to the CCMA and will now await a date for the conciliation to take place. It is also provided in the rules that the conciliation must be scheduled no later than thirty (30) days after it has been properly referred to the CCMA. At conciliation, the Commissioner will now assist parties to possibly see eye to eye and perhaps, just perhaps resolve the matter. •

“AT CONCILIATION, THE COMMISSIONER WILL NOW ASSIST PARTIES TO POSSIBLY SEE EYE TO EYE AND PERHAPS, JUST PERHAPS RESOLVE THE MATTER.”



RULE ELEVEN

WESLEY FIELD

Let's say there is a company called ABC Manufacturing, and they are facing financial difficulties. As a result, they need to consider retrenching some of their employees to sustain the business. The company decides to initiate a retrenchment process and consult with the affected employees and their representatives.

According to the rules of the Commission for Conciliation, Mediation, and Arbitration (CCMA), before proceeding to arbitration, a conciliation hearing must be scheduled to attempt to resolve the dispute through mediation. In this case, the relevant sections of the Act governing the matter are Section 64, Section 65(2)(a), or Section 189A(8).

To comply with the CCMA rules, the Commission will send a written notice to the parties involved in the dispute. The notice of the conciliation hearing must be provided at least seven (7) days prior to the scheduled date in matters relating

to the specified sections of the Act mentioned above. This means that ABC Manufacturing and the affected employees or their representatives will receive a written notice at least one week before the scheduled conciliation hearing.

However, if the matter does not fall under the specified sections mentioned above, the Commission must provide a notice of at least fourteen (14) days prior to the scheduled conciliation hearing. This longer notice period allows the parties involved to prepare adequately for the hearing and gather any necessary evidence or documentation.

Nevertheless, there may be situations where the parties agree, or reasonable circumstances require a shorter notice period. For instance, if both ABC Manufacturing and the affected employees or their representatives agree that a shorter notice period would be sufficient, and the Commission has the flexibility to provide a shorter notice period.

Furthermore, if the notice of conciliation is sent by registered mail only, an additional seven (7) days must be provided. This ensures that the parties

have enough time to receive the notice, especially if postal delivery times are slower or there are potential delays in mail delivery.

By adhering to these rules, the CCMA aims to ensure that parties involved in labour disputes are given sufficient notice and time to prepare for conciliation hearings, promoting fairness and effective resolution of disputes. ▪

RULE TWELVE

TAMMY KOEKEMOER

Be it over the phone or at the CCMA's doorstep, this rule sets the stage for an informal, flexible chat that might just sidestep a formal hearing. No obligations, no formalities, just a short-notice attempt to see eye to eye and settle the dispute, ensuring that the wheels of justice don't get bogged down in bureaucracy.

The Commission or a commissioner may contact the parties by telephone or other means prior to the commencement of the conciliation, in order to seek to resolve the dispute.

Just after the employee referred the matter to the CCMA and the CCMA's case management has activated the matter on their system, the CCMA may contact the parties by telephone or other means prior to the commencement of the conciliation or Con/Arb process to try to resolve the dispute without a formal hearing. This is called "pre-con" (pre-conciliation).

The pre-con can happen telephonically or at the CCMA. No formal set down or SMS confirming the date and time will be sent out to the parties. There is no obligation on the parties to agree to attend a "pre-con". Seeing that a pre-con will always happen on short notice, it is important to confirm the availability of an official of Consolidated Employers Organisation if you wish to be represented before you as the employer agrees on a date and time of the pre-con.

If parties fail to attend a pre-con after the date and time were agreed upon or parties could not resolve the matter, the matter will then be formally set down.



SEIZING CONTROL: HOW **RULE 13** EMPOWERS PARTIES IN CONCILIATION HEARINGS

KRIAN RATHINAM

IN ESSENCE, RULE 13 OFFERS FLEXIBILITY AND THE CHANCE TO SAVE BOTH TIME AND RESOURCES IN AVOIDING AN ARBITRATION.

Conciliations play a vital role in the dispute resolution process in South Africa. It is always advisable that parties to a dispute fully exhaust this process prior to the arbitration. At arbitration, the parties are at the mercy of the Arbitrating Commissioner, whereas at conciliation, the parties themselves have the power to agree on an outcome.

Once consensus is reached, parties will sign a settlement agreement which is binding on both parties to the dispute. Rule 13 deals with the powers which a Commissioner may exercise when a party fails to attend a conciliation hearing at the CCMA offices.

In essence, the commissioner may do the following:

- Continue with proceedings.
- Adjourn the Conciliation to a later date within the 30-day period.
- Conclude the proceedings by issuing a certificate that the dispute remains unresolved.

The Commissioner must also consider certain relevant factors when deciding which of the above three options to proceed with, such as :

- Whether a party has failed to attend a previous conciliation.
- If any reasons were given for a party's failure to attend a conciliation
- Whether a conciliation can effectively take place in the absence of a party.
- If there is any prejudice to the other party.
- Any other relevant factors



In matters pertaining to dismissals, commissioners will often issue a certificate should a party fail to attend conciliation. Commissioners will, at times, try to contact parties to try and determine reasons for non-attendance, but calling the party who has not attended is not obligatory. In matters pertaining to Section 64 disputes involving picketing rules, a commissioner would normally avoid issuing a certificate until parties have engaged or finalised picketing rules themselves; what would often occur for such disputes is that a commissioner would call the other party that has not attended and extend the Conciliation by 30 days to allow the parties to try and resolve the dispute to avoid a strike.

Practical example - An employer was once notified by SMS that they had to attend conciliation. The SMS is only sent to parties a day or two before the dispute. The employer was unable to attend on such short notice. Our offices then sent correspondences to the CCMA providing the CEO official's cellphone details and requested that the Conciliation take place telephonically. On the day of the conciliation, the Commissioner called and we were able to settle the dispute on a neutral reference and sealed record. This, in essence, saved all parties to the dispute both time and resources in avoiding an arbitration.

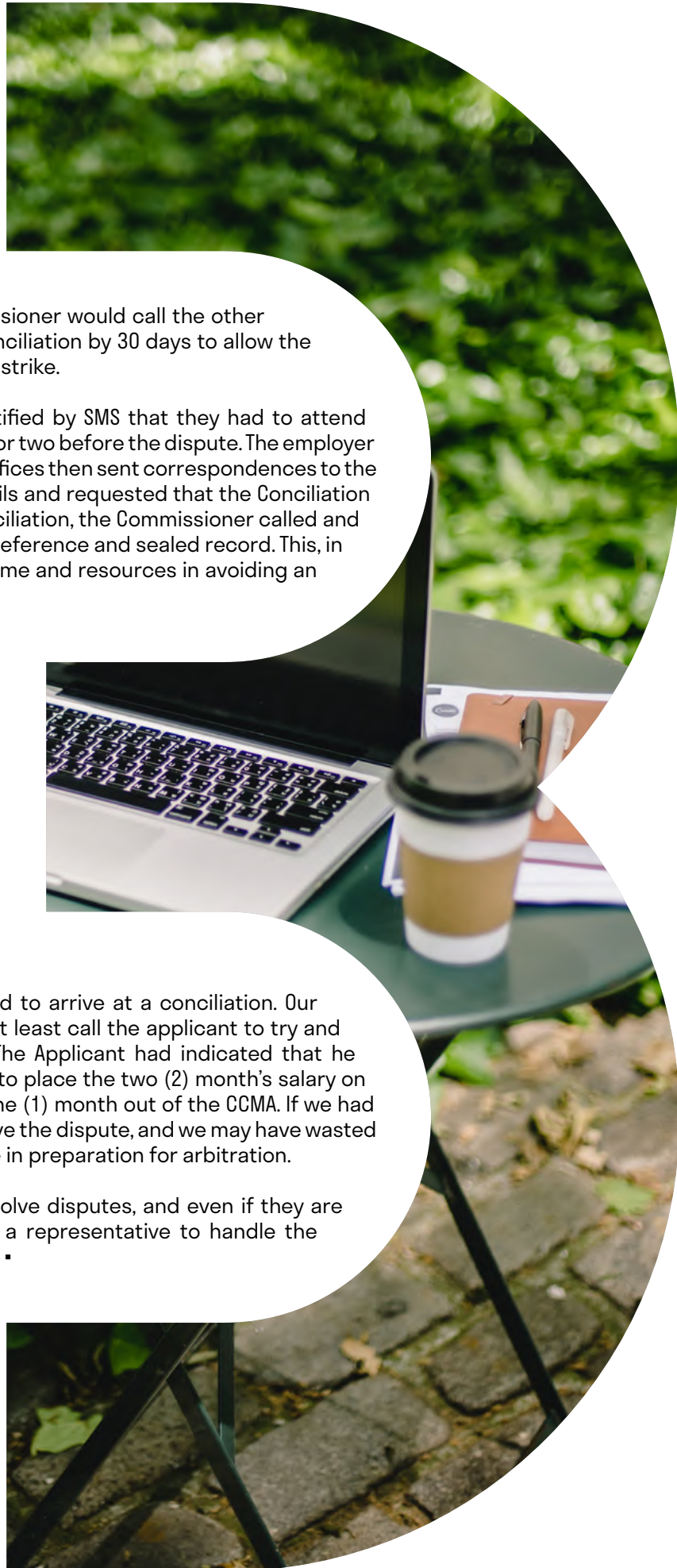
A further example is that if a party is unable to attend, request that the proceedings be held virtually via Microsoft Teams. In essence, even if a party is unable to attend physically at the CCMA, they can attend via Microsoft Teams. In holding the proceedings virtually, we were able to settle the dispute between the parties

An important example was when our offices had filed an objection to the CCMA for a Con/Arb; the commissioner had not seen the objection on file, and had we not attended, he would have issued a default award.

The last example was when the applicant failed to arrive at a conciliation. Our offices had requested that the commissioner at least call the applicant to try and see if the parties could resolve the dispute. The Applicant had indicated that he wanted two (2) month's salary. We were unable to place the two (2) month's salary on the negotiating table, but we later settled on one (1) month out of the CCMA. If we had not called, we would not have been able to resolve the dispute, and we may have wasted invaluable costs in attaining witnesses and time in preparation for arbitration.

It is always advisable for parties to try and resolve disputes, and even if they are unable to attend, to either attempt or obtain a representative to handle the conciliation with a mandate to resolve disputes. ▪

STATISTICALLY, 35.5% OF CONCILIATIONS ARE EITHER SETTLED (23.15%), OR APPLICANTS WITHDRAW THEIR DISPUTES (12.4%).



FOURTEEN

Whether it's the nature of the employer-employee relationship or the adherence to prescribed time frames, Rule 14 is the gatekeeper that directs the dispute to the proper channel.

Rule 14 of the CCMA Rules deals with determining whether or not the CCMA has jurisdiction to adjudicate a matter at the conciliation stage.

Jurisdiction refers to the competence of the CCMA to hear and determine a dispute between the parties. The CCMA is a statutory body established by the Labour Relations Act (LRA), therefore in the CCMA being a creature of statute it cannot deal with matters which fall out of their jurisdiction as stipulated in section 115 (4) of the LRA.

The following are some of the jurisdictional objections that may be made at the conciliation stage:

- a) Whether there is an employer-employee relationship;
- b) Where the parties fall under the jurisdiction of a Bargaining Council;
- c) Whether there is a dispute in terms of the LRA;
- d) Whether the matter was referred to the CCMA within the prescribed time frame.

One of the CCMA's objectives is to deal with disputes as fast as possible with minimal legal formalities, it therefore becomes necessary for the conciliating commissioner to determine whether the CCMA has the necessary jurisdiction to conciliate the dispute referred.

14-A

In terms of the Labour Relations Act, the CCMA is required to resolve disputes through the conciliation process within a period of 30 days from the date the referral was received.

In an effort to ensure that a meaningful conciliation process takes place, this 30 day period may be extended on request of either the conciliating commissioner or either of the parties.

The extension of the 30 day period often becomes relevant in mutual interest disputes where parties are involved in on-going negotiations, or a resolution of the dispute appears probable.

The extension of the 30 day prescribed period also becomes important when the CCMA is only scheduling the conciliation process a few days prior to the expiry of that period.

Should you wish to bring a formal request in terms of Rule 14A, the prescribed form should be used which is available on the CCMA website or from your CEO office. •

TENIELLE METH

CERTIFICATE OF DECISION: THE PIVOTAL TURNING POINT IN LABOUR DISPUTES – HOW RULE 15 DEFINES THE PATH FORWARD

This rule makes reference to a document which is commonly known at the CCMA as a Certificate of non-resolution alternatively a form 7.12.

The rule makes reference to section 135 (5) of the Labour Relations Act 66 of 1995 which states that when a conciliation has failed or at the end of a 30-day period or any further period agreed between the parties, the commissioner must issue a certificate which states whether or not the dispute has been resolved.

This specific document contains the parties names and it is at this point that the dispute will be categorised when the Commissioner ticks the box on the document e.g. arbitration, labour court, strike/lockout.

The above section states that this document must be served on both the parties to the dispute and that the original certificate must be filed with the Commission. Only once this document has been issued can an application for arbitration be made. ▪



SEALED SECRETS: THE SACRED PRIVACY OF CONCILIATION IN RULE 16 – “WHAT’S SAID HERE, STAYS HERE”

KENNETH LENNOX

Rule 16 reads as follows:

” Conciliation proceedings may not be disclosed:

(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing or as ordered otherwise by a court of law.

(2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation unless as ordered by a court of law or a Commissioner conducting an arbitration”

Conciliation is referred to as a “con” and forms part of the con/arb process, that will be dealt with in rule 17 of the CCMA rules.

A “con” or conciliation is an informal and of the record proceedings. In simple terms it means that what was said at conciliation cannot be used against a party during arbitration.

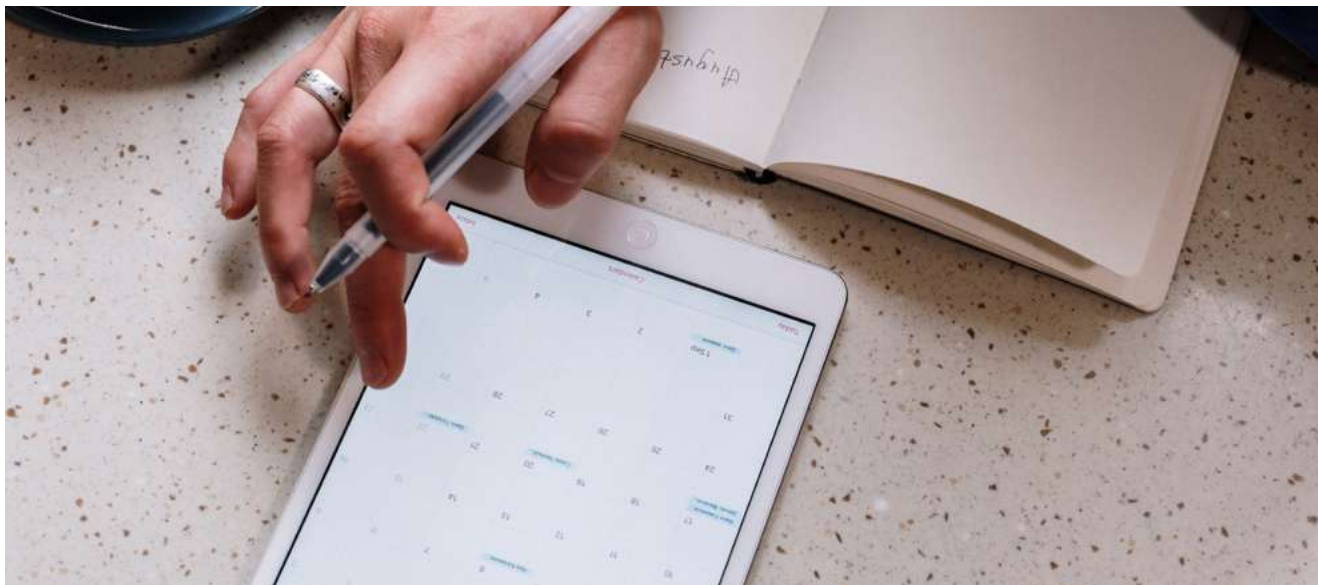
When a party says or admits to something at conciliation, the other party cannot use that against him/her at arbitration.

It is also important to take note of the term “without prejudice” as contained in rule 16. Without prejudice indicates an aspect of negotiation. This is used to negotiate, for example, settlement whilst still retaining one’s rights and therefore one does not waive their rights. The without prejudice principle protects discussions and negotiations.

Herewith a practical example:

Susan, the applicant, at conciliation says that she was indeed dishonest in that she took a certain product from work without the necessary permission. Her former employer, the Respondent, cannot then, at arbitration hold Susan accountable for such an admission. This is because it was said at conciliation, which is an informal and of-the-record proceedings. Such admission will not be considered and will be disposed of because it is done “without prejudice” and Susan’s rights will be protected. When a commissioner makes a ruling or an award, that same commissioner will not consider what was said.

Only if parties agree in writing or a court order indicates that what was said or admitted at conciliation can be used at arbitration, only then can such admission be considered as evidence. ▪



Rule 17: Scheduling, Objections, and Procedure in Con-Arb Hearings

IVAN MASHEGWANE

Rule 17 of the newly amended CCMA rules state that parties in a dispute must be informed, in writing, fourteen (14) days prior to the scheduled date, unless both parties agree to a short period or reasonable circumstances require a short period. If one of the parties is using registered mail for service, then a further 7 days must be permitted.

Should either one of the parties wish to object to the dispute being dealt with in terms of section 191 (5A), a written notice must be delivered to the Commission and the other party 7 days prior to the scheduled date. There are a few exceptions where an objection will not be considered, these include the following:

1. Dismissals relating to probation or an unfair labour practice relating to probation.
2. Disputes relating to a compliance order in terms of section 69(5) of the BCEA (Basic Conditions of Employment Act).
3. Claims for failure to pay any amount owing referred in terms of section 73A of the BCEA.

For example, if an employee refers a dispute stating that he/she is being owed their statutory monies an employer or the respondent party will not be able to object to this type of con-arb.

Should either parties and or their representatives fail to appear at the scheduled hearing, the commissioner will conduct the conciliation despite there being an objection to the dispute being dealt with in terms of section 191 (5A). where disputes relate to those mentioned as unobjected and or cannot be objected to, the commissioner will commence with the arbitration

immediately after a certificate of non-resolution has been issued. The commissioner will issue a different date for the arbitration should it not be finalised on the scheduled date. ▪

3 Key Components of Rule Seventeen:

- *Parties must receive written notice 14 days before the scheduled date, or 21 days if using registered mail.*
- *Parties can object to the dispute being handled under section 191(5A), but this must be done 7 days prior to the scheduled hearing.*
- *Certain types of disputes, such as those relating to probation or specific violations of the BCEA, cannot be objected to under this rule.*

Statistically, 33.6% of Objected Con/Arb's are either settled (24.6%), or Applicants withdraw their disputes (9%).

RULE EIGHTEEN: HOW TO REQUEST ARBITRATION

1. A party may request the Commission to arbitrate a dispute by delivering a duly completed LRA form 7.13, which may include using the official Commission electronic referral online portals.
2. When referring a request by means other than the official Commission electronic referral online portals as set out in Schedule One, the requesting party must:
 - (a) attach to the request, written proof, in accordance with Rule 6, that the request was served on the other parties to the dispute;
 - (b) is required to attach to the request, an application for condonation if the request for condonation is referred after the relevant time limit has expired.
3. Despite Rule 18(2)(b) where a request has been referred out of time and if condonation has not been attached to the request, the Commission will decide whether the condonation will be determined at a hearing or by written submissions received from the parties.
4. This Rule does not apply to con-arb proceedings held in terms of section 191(5A) read together with Rule 17.

When a matter is referred to CCMA, most cases will be set down as a con/arb process. With the exception of some matters, an employer party may then object to the matter proceeding as a con/arb and will only be heard as a conciliation. In the past, when an objected con/arb matter at CCMA remained unresolved, the referring party had to complete a 7.13 form to refer the matter to Arbitration.

The case of *Mkokeli v Bloomberg L P (Pty) Ltd* [2021] 6 BLLR 611 (LC) changed the CCMA process, in that a matter will automatically be placed for Arbitration if there was an objection against con/arb. Therefore, the referring party will no longer be required to complete a 7.13 form to refer a matter for Arbitration if there was an objection by the Respondent.

Herewith are two practical examples:

1. Mr X (Applicant) believes he was unfairly dismissed by the Company, ABC Holdings (Respondent). Mr X then refers an unfair dismissal matter to CCMA. The matter is set down for con/arb by the CCMA, where the Respondent party objects to the con/arb proceedings. The matter will then proceed as conciliation only on the set down date. Mr X and ABC Holdings, with the assistance of the CCMA Commissioner will attempt to resolve the matter at Conciliation. If the matter cannot be resolved, then a certificate of non-resolution will be issued by the Commissioner and the matter will automatically be set down for Arbitration on a new date.

2. Union Z refers an organisational rights dispute to the CCMA, where VQ (Pty) Ltd is the Respondent party. The matter will be set down for Conciliation by the CCMA, to see if the parties can reach an agreement with the assistance of the CCMA Commissioner. If the dispute remains unresolved the Commissioner will issue a certificate of non-resolution and Union Z will then have to refer to dispute for Arbitration by completing a 7.13 form within 90 days and serving it on the Respondent and CCMA. ▪



Did you Know?

With an amendment to section 19(1)(b), now an opposing party can respond with a simple affidavit instead of a formal 'statement of case.' This friendlier approach allows lay-people to engage without needing legal representation. So now, if you have something to say, you can just say it!

TAMMY BARNARD

RULE NINETEEN

The only amendment to this rule is found specifically in section 19 (1)(b) with the inclusion of the work "affidavit".

Prior to the amendment of the CCMA Rules, a commissioner could direct that the requesting party file a statement of case and the opposing party be allowed to respond by filing an answering statement.

The term 'statement of case' is better understood to be a formally written document which replicates that of a pleading in court proceedings. This section has been amended to include that the opposing party be allowed to submit an opposing statement or an affidavit.

The significance of the inclusion of an affidavit as opposed to only a statement of case indicates a sense of easing of legally technicalities.

By allowing the opposing party the opportunity to submit an affidavit opposed to a statement of case allows for a more user-friendly approach whereby a layman be afforded the opportunity to write a simple affidavit to respond to the requesting party which can be compiled and commissioned without the assistance of legal representation. ▪



STREAMLINING JUSTICE:

ANESTA KRUGER

RULE 20'S GUIDE TO PRE-ARBITRATION CONFERENCES IN THE CCMA

When the parties must hold a pre-arbitration conference:

(1) The parties to an arbitration must hold a pre-arbitration conference dealing with the matters referred to in sub-rule (3), if:

- (a) both parties are represented by a trade union, employer's organisation, legal practitioner or candidate attorney;
- (b) both parties agree to hold a pre-trial conference; or
- (c) directed to do so by the Provincial, Regional Senior Commissioner, or the Senior Commissioner in charge of a region or the presiding commissioner.

(2) A pre-arbitration conference convened in terms of sub-rule (1)(a) and (b) must be convened at least fourteen (14) days prior to the date of the scheduled arbitration.

A copy of the pre-arbitration minutes must be delivered to the appointed commissioner seven (7) days before the date of the arbitration hearing. If the pre-arbitration conference is not held, the commissioner may decide to continue with the arbitration but may consider awarding costs for the non-compliance.

The Respondent does not always know what the applicant's case is about, when receiving a CCMA 7.11 referral form, and therefore does not know what evidence to produce and which witnesses to call for the case. The purpose of this conference is to narrow the issues, reduce irrelevant evidence, and centre the proceedings on the actual issues for determination.

Parties will exchange documents that they will use in the arbitration, reach an agreement on the status of such documents, and decide what evidence will be required, what witnesses will be called, and what relief will be sought. The parties will be able to better prepare themselves for the arbitration day, so that they will not be met with countless surprises on that day. A pre-arbitration conference can, in certain circumstances, shorten a full-day arbitration to a half-day arbitration, as both parties know exactly what is expected of them.

The pre-arbitration minutes serve as a binding contract between the parties and the parties cannot change their versions after submitting pre-arbitration minutes or during the Arbitration proceedings.

The parties must attempt to reach a consensus on the following aspects: [as per Rule 20(3)(a) to (r)]:

- (a) Any means by which the dispute may be settled;
- (b) Facts that are agreed between the parties;
- (c) Facts that are in dispute;
- (d) The issues that the Commission is required to decide;
- (e) The precise relief claimed and if compensation is claimed, the amount of the compensation and how it is calculated;
- (f) The sharing and exchange of relevant documents, and the preparation of a bundle of documents in chronological order with each page numbered;
- (g) How 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;
- (h) Whether evidence on the affidavit will be admitted with or without the right of any party to cross-examine the person who made the affidavit;
- (i) Which party must begin;
- (j) The necessity for any on-the-spot inspection;
- (k) Securing the presence at the Commission of any witness;
- (l) The resolution of any preliminary points that are intended to be taken;
- (m) The exchange of witness statements;
- (n) Expert evidence;
- (o) Any other means by which the proceedings may be shortened;
- (p) An estimate of the time required for the hearing;
- (q) The right of representation; and
- (r) Whether an interpreter is required and, if so, for how long and for which languages. ▪

Rule 20 of the CCMA stipulates the conditions under which parties must hold a pre-arbitration conference, outlining the requirements for convening, conducting, and documenting the conference, with the aim to clarify the issues, reduce irrelevant evidence, and streamline the arbitration process.

SETTING THE STAGE: THE 21-DAY NOTICE PERIOD FOR ARBITRATION IN THE CCMA

WESLEY LAZARUS

Rule 21 relates to notice the Commission (“CCMA”) must notify the parties to a dispute of a date of set down for Arbitration. The Rule simply refers to the notice period the CCMA must afford the parties when setting down a dispute for Arbitration.

In terms of Rule 21 it provides that the CCMA must afford twenty one (21) days notice to the parties when setting down a dispute for Arbitration. The Rule is however not absolute and provides that should the parties agree or on good cause the date may be before 21 days. A further proviso is made in the event the Commission notifies a party by Registered mail, an additional seven (7) days must be added.

The Rule is unambiguous, when a party receives a set down for Arbitration, they should look at the date of the notice and the date of the Arbitration. If the date of Arbitration is not twenty on (21) days from the set down date, this is counted by excluding the first day, including the last day, it excludes public holidays and includes weekends. Should the CCMA set down not comply with the Rule, a party may notify the CCMA of a defective set down.

Another practical example of the Rule is where a party cannot attend an Arbitration on the date of set down due to a good reason (eg: Maternity leave), instead of the parties postponing the matter until the party can attend, the CCMA may seek consent from the parties in the dispute to move the matter forward to prevent unnecessary delay. ▪





Rule 22: The limitations of the CCMA's jurisdiction to preside over matters.

LAUREN MOODALEY

Rule 22 of the CCMA rules deals with the Commission having to decide whether to arbitrate a dispute. The Rule relates to whether the CCMA has with jurisdiction to deal with the matter. Jurisdiction is where the CCMA (or a Bargaining Council) has the power to make legal decisions and judgments.

There are certain industries, for example the building industry, which have their own established council to deal with matters in terms of the relevant Acts. Thus, all matters that fall within a specific industry should be heard before that specific bargaining council. If a matter is referred by an Applicant to the CCMA and they belong to a specific industry, it creates a jurisdictional point. Rule 22 thus indicates that if no jurisdictional point has been raised, the referring party would need to establish that the CCMA does have jurisdiction to deal with the case.

In practice, it is often best for the Respondent, if they do belong to another industry which has an established bargaining council, to present the Commissioner with a certificate of good standing. At this point, the matter becomes moot before the CCMA commissioner and thus will be transferred to the bargaining council.

If there is no jurisdictional point raised, the Applicant bears the onus to show that the CCMA has jurisdiction. In order to establish the jurisdiction in terms of Rule 22, an Applicant would need to show that the referral was made in time and that there is no need for condonation applications, that they do not belong to a bargaining council and that the dispute is one that can be adjudicated by the CCMA. Therefore, Rule 22 is important to the determination as to whether the CCMA will preside over a dispute or not. ▪

Limitations related to Rule 22.

- **Industry-Specific Limitation:** Certain industries have their own established councils to deal with matters, and disputes in these industries should be heard by the specific bargaining council.
- **Jurisdictional Challenge:** If a jurisdictional point is raised, the referring party must establish that the CCMA has the power to deal with the case.
- **Requirement for Good Standing:** If a respondent belongs to an industry with an established bargaining council, a certificate of good standing may be required to transfer the matter to the proper council.
- **Onus on the Applicant:** If no jurisdictional point is raised, the applicant must show that the CCMA has jurisdiction, including timeliness of referral, non-affiliation to a bargaining council, and that the dispute can be adjudicated by the CCMA.

"Therefore, Rule 22 is important to the determination as to whether the CCMA will preside over a dispute or not. In practice, jurisdictional points such as belonging to a specific industry or adhering to referral timelines must be clearly established for the matter to be heard before the CCMA."

“The Commission may postpone an arbitration without the parties appearing. There is no right to postponement.”

RULE 23: POSTPONEMENTS SHOULD BE A LAST RESORT

EDRICH FOURIE

I am the employer, and I am requested to attend the Commission for Conciliation, Mediation and Arbitration (CCMA) for a case but are unable to do so. What now?

Employers can request that their case be postponed to a more suitable date and time. Although the CCMA is a creature of statute and operates within set rules and guidelines, postponements will not automatically be granted just due to the unavailability of either party.

Postponements are dealt with in terms of Rule 23 of the CCMA rules. In terms of this rule the parties may agree in writing to the postponement of the arbitration hearing and send the agreement to the CCMA at least seven (7) days before the scheduled date. There should be written confirmation by both parties that they agree to the postponement.

In the absence of an agreement or where there is fewer than seven (7) days before the arbitration hearing, an application for postponement must be made in writing (This part of the postponement can be seen in rule 31) and the CCMA will decide whether to postpone the matter.

Previously, if all parties agreed to a postponement seven days before a hearing, the CCMA was under an obligation to postpone the proceedings. The word “must” in Rule 23(2) has now been changed to “may” to reflect that “The Commission may postpone an arbitration without the parties appearing”. In addition, Rule 23(5) has been added to the Rules, which confirms that “There is no right to postponement.” This signals that securing postponements in the CCMA are going to be more difficult in future. It is therefore advised that postponements should be a last resort and cannot be guaranteed. ▪



**PROCRASTINATION IS
THE THIEF OF TIME.
CHARLES DICKENS**



DETERMINING JURISDICTION IN DISPUTES: LOCATION MATTERS

CASS-LEIGH ORANJE

Where the Cause of Action Arose or the Employer's Principal Place of Business: Rule 24 of the CCMA's Guide to Jurisdiction

Rule 24 of the CCMA rules states that jurisdiction (where the matter can be heard) is determined on where the cause of action arose or where the employer's principal place of business is located. The CCMA will consider these factors prior to setting down a conciliation or an arbitration. Any party may further raise a jurisdictional point at the hearing if the matter was incorrectly set down.

If the employers business has locations throughout the country and the head office is in Durban but the employee worked at the Port Elizabeth branch and the course of action occurred in Port Elizabeth (the employee was dismissed in Port Elizabeth), the Port Elizabeth branch would have the jurisdiction to set down and hear this dispute. ▪

RULE / 25

Restrictions on Legal Representation in Arbitration: Balancing Fairness and Complexity in Unfair Dismissal Cases

(1)(b) Subject to sub-rule 1(c), in any arbitration proceedings a party to the dispute may appear in person or be represented only by –

- (i) a legal practitioner;
- (ii) a candidate attorney;
- (iii) an individual entitled to represent the party at conciliation proceedings in terms of sub-rule (1)(a).

(1)(c) If the dispute being arbitrated is referred in terms of section 69(5), 73 or 73A of the BCEA or is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employees conduct or capacity, a party is not entitled to be represented by a legal practitioner or a candidate attorney in the proceedings unless:

- (i) the commissioner and all other parties consent;
- (ii) the commissioner concludes 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.



No legal representation is permitted during Conciliation proceedings, per Rule 25 of the CCMA Rules. Rule 25(1)(c) further states that should a dispute relate to the fairness of a dismissal, an employee's conduct or capacity, as well as to a compliance order or alleged monies owing – then such employee is not entitled to be represented by a legal representative, unless:

The Commissioner, and all parties, consent;

When it is unreasonable to expect a party to deal with a dispute without legal representation – considering the nature of questions in law raised by the dispute, the complexity of the dispute, public interest, and the comparative ability of the opposing parties/representatives to deal with the dispute.

As a CEO Dispute Resolution Official, we will oppose any application for legal representation on our member's instructions. Two significant precedents that reinforce our opposition are in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & Others* (2009) 30 ILJ 269 (LAC), where it was held that there is no automatic right to legal representation at the CCMA. In *CCMA & Others v Law Society of the Northern Provinces* (2013) 34 ILJ 2779 (SCA), the Court found that Rule 25 of the CCMA Rules was neither unconstitutional nor irrational. It held that there was no absolute right to legal representation and that the nature of labour disputes was such that they should be dealt with speedily.

In my experience, I find that commissioners should further be cautious when applying their discretion in granting legal representation as same may unnecessarily complicate an otherwise simple dispute, which directly undermines the CCMA and its vision – especially in cases where the CCMA Rules have not been complied with in applying for legal representation 14 days prior to the date of the dispute.

JOINER AND SUBSTITUTION IN ARBITRATION PROCEEDINGS: NAVIGATING RULE 26 OF THE CCMA

AMANDA KOESNELL

Rule 26 of the CCMA deals with the joinder and/or substitution of parties to proceedings. In terms of this rule:

A Commissioner may, at any stage or prior to the conclusion of an arbitration hearing, join any number of persons as parties to the proceedings if their relief depends on substantially the same question of law or fact.

A Commissioner may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

A Commissioner may join a party if that party may be prejudicially affected by the outcome of the proceedings.

A commissioner may make such an order in the following instances:

- (a) of its own accord;
- (b) on application by a party; or
- (c) if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party”

To understand the above rule better, its application can be illustrated by an example: Imagine employee “A” and “B” both apply for a position internally in their workplace. Let us say employee “B” is promoted into the position, but employee “A” feels that he or she was the best candidate. If employee “A” refers a dispute to the CCMA against the employer, the outcome of that dispute might affect “B”.

Therefore, even though the initial dispute is between “A” and the employer, “B” might have to be joined into the proceedings “B” in this instance has direct and substantial interest in the subject-matter. He or she might be prejudiced by the outcome of the dispute i.e. the appointment of “B” might be set aside.

The joinder of “B” into the proceedings might be done by the commissioner, in his or her own accord, or on an application made by any party. This application will need to comply with Rule 31 of the CCMA.

Rule 26 further deals with substitution of parties. In some instances, it might be necessary to substitute parties. If the referring party refers a dispute against the wrong employer, instead of referring the dispute afresh, any party may apply to the CCMA for an order substituting that party or an existing party. ▪



JOLEZE ROUX

RULE 27 OF THE CCMA

This CCMA Rule pertains to situations where a party involved in proceedings has been mistakenly or inadequately notified or identified. In such cases, the commission or commissioner overseeing the proceedings has the authority to rectify the error or defect. This can be done in three ways:

1. On their own initiative: The commission or commissioner may independently recognise the mistake or defect and take steps to correct it without any external prompting.
2. With the consent of the parties: If all parties involved in the proceedings agree, the commission or commissioner can proceed with rectifying the error or defect.
3. Through application and notice: Alternatively, if a party wishes to address the error or defect, they can formally apply for its correction. In this case, the commission or commissioner will provide notice to all relevant parties to ensure transparency and allow them to respond.

The purpose of this rule is to ensure fairness and procedural integrity within the proceedings by addressing any inaccuracies or deficiencies in the citation of parties. It provides flexibility for the commission or commissioner to correct mistakes in a manner that best serves the interests of all parties involved. ▪

ONE HEARING, MANY VOICES.

JAUNDRÉ KRUGER

Picture a manufacturing company, XYZ Manufacturing is facing multiple individual disputes from different employees who claim that they have been victims of unfair labour practices. Each employee has filed a separate dispute with the CCMA, seeking remedies for their specific grievances.

In this scenario, the CCMA or a commissioner, acting on their own initiative, with the consent of all parties involved, or upon application by one of the parties, may consider consolidating these separate disputes into a single matter. The purpose of consolidation is to deal with related disputes more efficiently and effectively.

For consolidation to occur, certain criteria outlined in the rule must be met:

(a) Similar or substantially the same questions of law and fact: The relief sought in each of the individual disputes should depend on the determination of similar or substantially the same questions of law and fact. For example, if multiple employees are claiming unfair dismissals based on a common set of circumstances, arising from the same cause of action, such as alleged misconduct or breach of employment contracts, the questions of law and fact may be considered similar.

(b) No substantial prejudice: Consolidation should not cause substantial prejudice to any of the parties involved. In other words, the parties to be joined through consolidation should not suffer unfair disadvantage or harm by having their disputes combined into a single matter.

(c) Balance of convenience: The balance of convenience should favour consolidation. This means that it should be more convenient and practical for the disputes to be consolidated rather than dealt with separately. Factors such as time, cost, and the overall efficiency of the proceedings will be taken into account.

(d) Jurisdiction of the CCMA: The CCMA must have jurisdiction over all the disputes that are sought to be consolidated. This ensures that the CCMA has the

authority to handle and adjudicate all the matters involved in the consolidation.

To illustrate, let's say that in our example, the separate disputes filed by different employees against XYZ Manufacturing all revolve around allegations of unfair dismissals due to the company's restructuring process. The employees claim that their terminations were not in compliance with the applicable labour laws and employment agreements. As the questions of law and facts in each dispute are similar or substantially the same, and there is no substantial prejudice or unfair disadvantage to the parties involved, the CCMA may consider consolidating these disputes into a single proceeding.

Consolidation can streamline the resolution process by allowing the parties to present their arguments, evidence, and defences together, avoiding duplicative hearings and potentially reaching a more comprehensive and consistent outcome. ■



SHANNEN BROWN

Unlocking Transparency with Rule 29: The Art of Evidence Exchange Before Arbitration

Parties to an arbitration will exchange bundles of documents and/or other evidence to be used during the arbitration, this is usually done on the day of the arbitration. However, Rule 29 of the CCMA rules states that parties can request disclosure of documents/evidence before the arbitration. The parties may agree on the disclosure of evidence or request a commissioner to make an order as to the disclosure of the relevant evidence. For the request for disclosure of documentation to be compliant with the CCMA Rules there are two requirements, firstly, the request must be made after the request for arbitration and secondly, the request must be made at least fourteen days before the date of the arbitration.

Any documents and evidence can be requested. An example of this is in a matter where the applicant is represented by a Trade Union, the applicant requests evidence from the respondent such as minutes and recordings of the applicant's disciplinary hearing as well as CCTV footage used against the applicant in the hearing. In turn, the respondent may request a copy of the trade union's registration documentation, constitution and proof that the applicant is a paid-up member of the union. A commissioner will then issue a ruling directing the parties to share the documents/evidence by a specific date, prior to the arbitration. This ensures that both parties are properly prepared for the proceedings on arbitration day. ▪



RULE THIRTY

ERNEST MASUPYE

In terms of the new Rule 30, if the referring party to the dispute fails to attend or be represented at an arbitration proceeding before the CCMA the commissioner may remove the matter from the role if he/she is satisfied that the party had properly notified of the proceedings.

Previously Rule 30 stipulated that in the same circumstance as above the commissioner could dismiss the matter and the referring party will have to apply for rescission. The above rule changed after the Labour Court ruled that a commissioner can only dismiss a matter after assessing the merits, thereby diluting the power to dismiss a case when the referring party fails to appear for arbitration.

Subsequently however, after the directive was issued to change Rule 30, the Labour Appeal Court restored the power of a commissioner to dismiss a matter where the referring party fails to attend the arbitration. The result is that the amended rule 30 is again not in line with the discretion of a commissioner to dismiss a matter.

In an instance, that the employer fails to attend an arbitration hearing, even after proper service has been effected and the employer failed to file a postponement application timeously, the Commissioner may decide to proceed with the arbitration, and issue a default award if the applicant is present. Furthermore, the rule provides that in the event that the referring party fails to attend the proceedings, and after the Commissioner has satisfied themselves that there is not a valid reason for absence, the Commissioner may proceed to dismiss the matter.

The next step would be for the Respondent to file a rescission application, but it should be noted that Rescission application are not easily granted, more especially if proper service was effected on the Respondent, and the CCMA utilized the correct contact details to send through the notice of set down, therefore, it is always advisable to attend CCMA proceedings, or file proper application, if you will not be able to attend the arbitration. ▪



Statistically, 38.8% of all Arbitration's are settled between the parties and a further 10.25% result in Applicants withdrawing their disputes.

THIRTY ONE

LEME STANDER

Rule 31 stipulates in detail how to bring an application, this includes condonation, joinder, substitution, rescission, postponement, disclosure of documents and any preliminary or interlocutory disputes.

The application must be at least 14 days prior to the set down date of the proceedings and must be served on all the relevant parties to the matter and same must be filed at the relevant Commission.

The party bringing the application must bring same in accordance Rule 4, this includes the title of the application, case number, relief sought, address where delivery will be accepted, the days for opposing the application and a list of relevant documents attached in support of the application.

The Application must be supported by a written statement and/or affidavit which contains a concise statement on why the referring party is bringing the application. Rule 31(4) sets out the requirements for same:

1. Relevant parties' names, description and addresses must be cited.
2. Statement of material facts, this is the reason for the application, must be chronologically set out.
3. If the application is filed outside of the prescribed time, grounds for condonation must be cited in accordance Rule 9. Reasons for the late filing must be chronologically set out with supporting documents attached.
4. If the application is filed on an urgent basis, grounds (reasons) for the urgency must be cited. The Commission may dispense with some or all the requirements in this Rule, depending on the reasons advanced by the referring party and may only grant against a party who has had reasonable notice of the application.

Once the application has been served and filed the opposing party has 5 (five) days to serve and file their answering affidavit. The party bringing the application has another opportunity to reply to the issues raised in the answering affidavit, within 3 (three) days. No new issues may be introduced or raised at this stage

The Commission may put the matter down for a hearing or determine the application on paper. ▪

RULE THIRTY TWO

SHANNEL ARIKUM

THE ART OF RESCISSION AND VARIATION

Rule 32 of the CCMA rules provides that any party may apply to have an award or ruling rescinded or varied.

A rescission refers to a request to have an entire award or ruling set aside or revoked. Whereas a variation is to request that only a part of the award or ruling be amended, such as a party's name or an incorrect date.

An award or ruling may be rescinded or varied by the Commissioner who issued the award or ruling, or by any other Commissioner that has been appointed by the Director of the CCMA to do so.

The following instances are in which an application for rescission or variation may take place;

- If an award or ruling was issued in the absence of any party affected by the award or ruling, and such party shows that there was no wilfulness in their absence;
- there is any ambiguity, or obvious errors or omissions, in which case the award or ruling may only be varied to such an extent to correct the ambiguity, error, or omission;
- If the award or ruling was made as a result of a mistake that both parties agree is a mistake.

Rule 32 of the CCMA offers a vital mechanism to amend or revoke arbitration awards or rulings, ensuring accuracy and fairness. Whether correcting an obvious error or addressing a missed hearing, it provides parties the opportunity to seek necessary adjustments within the legal framework, preserving the integrity of the dispute resolution process.

For example, if an employer misses the arbitration date because they were not notified of the date, and they receive a default award, which states that they may have to compensate, re-employ or reinstate an employee, such employer may apply for a rescission of that award, provided that they can show good reasons for their absence.

To apply for a rescission or variation of any rule or award, any party may apply to the Commission, within 14 days of the date on which they became aware of the award or ruling. The Application must be signed and should contain the following information;

- Title of the matter;
- The case number;
- Relief sought
- Address of the party making the application and where they shall accept services of any documents (this may be an email address);
- A notice to the other party that if they intend to oppose the application, they should oppose same by way of an answering affidavit and delivering it within five (5) days after they receive the application;
- A schedule listing all the relevant documents about the application; and
- The application must be supported by an affidavit

that sets out the details and addresses of parties, and a statement of the material facts which they are relying on in the application.

If the applicant party receives an answering affidavit, they may respond to the answering affidavit by way of replying affidavit.

The outcome of this application may be done on papers, meaning that the CCMA will make a decision without parties having to attend the CCMA and will receive a written ruling. Should the matter be set down for a hearing at CCMA, any party may also make oral submissions.

It is important to comply with the above time limits, any non-compliance will require you to submit a condonation application in terms of Rule 9 and 31. ▪

"Under Rule 32 of the CCMA rules, if a mistake has been made in an award or ruling, you've got 14 days to apply for it to be amended or even completely revoked. But be warned: if you miss the time limit, you'll need to submit a special condonation application!"



CHARTING THE PATH TO LABOUR COURT: NAVIGATING RULE 33 OF THE CCMA

MARETHA VAN ROOYEN

Either party may refer the dispute to Labour Court and must follow rule 33 of the CCMA to comply with the correct procedure.

- (1) An application in terms of section 191(6) of the Act to refer a matter to the Labour Court, must be delivered-
- (a) within ninety (90) days of a certificate that the dispute has not been resolved being issued; or
 - (b) by a party that has not requested arbitration, within fourteen (14) days of the referral for arbitration being filed.

[In terms of section 11(b) of the Act, the Labour Court may condone non-observance of the timeframe on good cause shown.]

- (2) Despite subrule (1), a party that requests arbitration may not thereafter make an application in terms of section 191(6).

- (3) The application must state the grounds on which a party relies in requesting that the dispute be referred to the Labour Court.

- (4) If the party to the dispute objects to the matter being referred to the Labour Court, that party must state the grounds for the objection within seven (7) days of receipt of the application.

- (5) The Commission must notify the parties of its decision in terms of section 191(8) within fourteen (14) days of receiving the objection.

- (6) In the event that the request has been granted, the party who apply for the referral by the Director must refer the matter to the Labour Court in line with rule 11 of the Rules of Conduct of Proceedings in the Labour Court.

The application should comply with rule 31, but subject to a shorter time period to oppose it in terms of subrule 33(4), and delivery of the application must be in terms of rule 5 and rule 5A. The time periods must be calculated in terms of rule 3.

At conciliation, but also at arbitration, or even during the arbitration process, any party may raise a point in limina, concerning the CCMA's jurisdiction to hear the dispute. It may also happen that during the arbitration hearing, the applicant may allege that the reason for his dismissal is not 'misconduct' as per notice of dismissal, but due to a reason as set out in section 191(5)(b) or 191(6) of the Labour relations Act.

In terms of section 191(5)(b) of the Act, the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is;

- (i) automatically unfair;
- (ii) based on the employer's operational requirements;



“Either party may refer the dispute to Labour Court and must follow rule 33 of the CCMA to comply with the correct procedure. An application in terms of section 191(6) of the Act to refer a matter to the Labour Court, must be delivered within ninety (90) days of a certificate that the dispute has not been resolved being issued; or by a party that has not requested arbitration, within fourteen (14) days of the referral for arbitration being filed. In terms of section 11(b) of the Act, the Labour Court may condone non-observance of the timeframe on good cause shown.”



(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
 (iv) because the employee refused to join, was refused membership of or was expelled from the trade union party to a closed shop agreement.

One scenario that representatives often come across, is when a union official representing his/her member, knowing that the applicant case weakened, suddenly put a question to the respondent in cross-examination that the hearing was just a scam to get rid of the applicant. The applicant was the one introducing the employees to the union and was thereafter dismissed. The commissioner must establish first what is the applicant's true belief as reason of his dismissal, whereafter the

commissioner will have to make a ruling. The CCMA will usually hear both parties' arguments and may also, on good cause, issued a certificate referring the dispute to Labour Court.

Should it become known during con/arb that respondent employs 10 or more employees, and more than one employee were retrenched the CCMA will issue a certificate, indicating that the matter must be referred to the Labour Court. Also, should the dismissal be due to an unprotected strike, it must be referred to Labour Court. Parties, including CCMA, may also on request, refer a dispute to Labour Court for adjudication on a question of Law, public interest, complexity, or conflicting arbitration awards. ▪

Did you know?

If a union official suddenly questions the legitimacy of a hearing during a weakened case, it can lead to a complex scenario where the commissioner must determine the applicant's true belief for dismissal. This unusual twist could eventually lead the CCMA to issue a certificate referring the dispute to the Labour Court!



HOW TO REQUEST AN INQUIRY IN TERMS OF SECTION 188A OF THE LABOUR RELATIONS ACT

RIYAADH VALLY

RULE 34: In terms of Section 188A of the LRA, an employer may, with the consent of the employee or in accordance with a collective agreement, request that the relevant forum involved in the dispute resolution process appoint an Arbitrator to conduct an inquiry into allegations relating to the conduct or capacity of the specific employee.

Rule 34 of the CCMA Rules comes into effect when an Employer requests the Commission or any other accredited dispute resolution forum to conduct such an inquiry. This request must be done by delivering a completed LRA Form 7.19 to the Commission or the relevant dispute resolution forum.

The LRA Form 7.19 will only be complete if it has been signed by the employee or if the employee has agreed to the inquiry in his/her contract of employment or if the inquiry is held in accordance with a collective agreement as

stipulated in Section 188A(4)(b) of the LRA. One must keep in mind that if the inquiry is agreed to in terms of the employees' contract or a collective agreement a copy of such document must be attached to the 7.19 Form.

When completing the LRA Form 7.19, the employer must make payment of the prescribed fee to the commission, payment may only be made by means of a bank guaranteed cheque or electronic transfer into the bank account of the Commission. Currently the prescribed fee ranges from R3,213.50 – R7,301.73, and is inclusive of all direct and variable costs. This fee is subject to change.

After having received the completed request form and the prescribed fee either by hand or by email in terms of Rule 7 of the CCMA Rules, the Commission must within 7 days notify the parties as to when and where the inquiry will take place in

terms of Rule 34(4) and unless the parties agree to the contrary the Commission must give the parties at least 7 days' notice of the commencement of the inquiry.

Should the parties resolve the matter prior to the issuing of the notice confirming when and where the inquiry will take place the Commission is required in terms of Rule 34(6) to tender a refund of the prescribed fee paid.

It is important to keep in mind that an Arbitrator appointed in terms of Section 188A has all the powers conferred on a Commission in terms of Section 142 of the LRA and the ruling of the Arbitrator has the same status as an Arbitration Award.

Furthermore, it should be noted that an Employee who earns more than the amount determined by the Minister in terms of Section 6(3) of the Basic Conditions of Employment Act is not precluded from this type of inquiry and may consent to the holding of such inquiry in his/her contract of employment. ▪



KAGISO SEBETSO

Rule 35 empowers the CCMA to condone non-compliance with the Rules upon application for such condonation in accordance with Rule 31 which prescribes the form in which such applications must be made. ▪

RULE THIRTY-SIX

CLAIRE TURNER

1. The Commission must keep a record of –
 - (a) All processes except Conciliations, unless otherwise stated in these Rules;
 - (b) Any arbitration award or ruling made by a Commissioner.
2. The record must be kept by means of a digital recording and, if practically possible, also by legible notes.
3. A party may request a copy of the record or a portion of a record kept in terms of sub-rule (2), on payment of the costs where applicable.

The purpose of Rule 36 was to eliminate the problems previously experienced by the Labour Court which was discussed in *Uee-Dantex Explosives (Pty) Ltd v Maseko and Others (2001) 22 ILJ 1905 (LC)* where the Judge said: “It is self-evident that it is not only eminently reasonable and practical to keep such a record, but also necessary.

Keeping a record of the Arbitration proceedings provides objective material upon which the court exercises its Review powers. It eliminates, or keeps to a minimum, disputes of fact about what transpired at the Arbitration proceedings.”

The record of CCMA/Bargaining Council proceedings is retained by the relevant regional office registrar. In terms of Rule 36 (3), a party to the proceedings may request a copy of the record or a portion of such record, upon paying the prescribed fee.

Scenario: Arbitration commenced, and the Commissioner rendered an Award in favour of the Respondent. The Applicant seeks legal advice and decides to take the decision on Review at the Labour Court. The Labour Court will then request a transcript of the recordings of the Arbitration and all documentary evidence will be presented to the Court.

The Judge will now review the decision by reading the record and accessing the documentary evidence. If, for whatever reason, the proceedings weren't recorded or the recordings are inaudible, then the Judge will request legible notes from all parties involved in the Arbitration proceedings.

If there are no recordings or legible notes, then the Judge will not be in a position to properly Review the case and in all likelihood, transfer the matter back to the Arbitration. ▪

RULE 37

BUHLE MASUKU

Summoning the Truth: The Power and Procedure of Witness Subpoena in Arbitrations

Arbitrations are usually very reliant on witness testimonies to prove the case of the employer. However, it sometimes becomes a challenge to convince people to testify in arbitrations. People usually have different reasons for their reluctance including a resignation from the employer who requires them to testify amongst others.

Should a witness be needed, and they are not there, a request can be filed with the CCMA to issue a subpoena to the witness for them to appear and testify at the CCMA. The subpoena is requested by filling in an LRA 7.16 form and attaching written motivation as to why the witness is important for the case. The form can be obtained on the CCMA website or physically at the CCMA.

The form must be filled in at least 14 days prior to the hearing date and filed with the CCMA. Once the CCMA stamps the subpoena and returns it to the requesting party, it must be served on the witness at least 7 days prior to the hearing date. Due to the time limits, it is helpful to be pro-active while pursuing this, if the CCMA does not respond by a certain time, it is advisable that you physically go and ensure that they finalise the said subpoena.

The requesting party will be required to pay a witness fee as prescribed (the government gazette can be checked for the latest rate) and also cover reasonable travelling costs for the witness (there is no CCMA prescribed rate for this so most parties often use AA rates). ▪

THE PRICE OF TRUTH

RULE 38

GORDON FLANAGAN

A party may require a witness to testify to certain facts at arbitration and in support of their case. It may happen that the particular witness will have to be issued with a subpoena to attend the process. Where a party wishes to subpoena a witness, it will be required to pay a witness fee to that witness together with the witness's reasonable travel and subsistence expenses.

Without witnesses, Employers will find it extremely difficult to win the case because the testimony of witnesses normally forms the crucial core of the procedure at any arbitration hearing. Any party who requires the Commission or a commissioner to subpoena a person in terms of section 142(1) of the Act, must file a completed LRA Form 7.16 together with a written motivation setting out why the evidence of the person to be subpoenaed is necessary. Service of a subpoena must be accompanied by payment of the prescribed witness fees for one day in accordance with the tariff and allowances published by notice in the Government Gazette in terms of section 142(7) of the Act.

Regulation 4 of the Act provide for witness fees. The fee payable to a witness in terms of section 142(7) of the Act is the total of R300 for each day or part of the day during which the witness is required to be present at any proceedings. Payment should be made directly to the witness.

A subpoenaed witness can claim reasonable substantiated travel and subsistence expenses incurred in order to be present at those proceedings. Regulation 4 also provides that 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 any legislature mentioned in the Constitution.

Rule 38- Payment of witness fees:

1. A witness subpoenaed in any proceedings in the Commission must be paid a witness fee in accordance with the tariff of allowances published



by notice in the Government Gazette in terms of Section 142(7) of the Act.

2. The witness fee must be paid by -
 (a) the party who requested the Commission to issue the subpoena; or
 (b) the Commission, if the issuing of the subpoena was not requested by a party or if the Commission waives the requirement to pay witness fees in terms of Section 142(7)(c).

3. Despite sub-rule (1), the commissioner may, in appropriate circumstances, order that a witness receives no fee or reasonable travel costs and subsistence expenses or only part of such fees or expenses.

Section 142(7)(c) which is quoted under Rule 37 provides that the CCMA may pay the witness fee instead of the party applying for the subpoena, on good cause shown. It is presumed that a "plea of poverty" is an essential part of 'good cause' but due to inevitable budgetary constraints the CCMA will not be able to sponsor witnesses unless the cause is exceptional.

An example of an exceptional cause may be where there are important policy and legal considerations or if the case may affect public policy and prevent injustice. ▪

TAKAYEDZA MOYO

RULE THIRTY NINE

ORDER OF COSTS

The CCMA rules encompass instances when the commissioner may order costs. Accordingly, the order of costs ought to be in line with the requirements of law and fairness. Furthermore, the commissioner ought to use their discretion on whether to award such costs at arbitration.

E.g. The commissioner will look at success of parties, and consider the fairness of granting costs. In instances where parties acted in a frivolous and vexatious manner, the commissioner has the discretion to grant costs.

If a party is not represented by a legal practitioner or candidate attorney, the Commissioner may order the other party to pay the reasonable disbursements actually incurred of that party. Legal fees may only be awarded if both parties were represented by a legal practitioner or candidate attorney.

Legal fees of R7000.00 (VAT inclusive) for the first day and R4700.00 (VAT inclusive) for each additional day of arbitration may be awarded. An award for costs in respect of a candidate attorney must be 50 percent of the amount.

E.g. If at arbitration the Applicant or Respondent is not represented by an attorney, the Applicant or Respondent can only have a claim for disbursements.

The Commissioner may grant costs for Witnesses in attendance at R300.00. ▪

Did you know? At the CCMA, if you're not represented by a legal practitioner, you can only claim disbursements, not legal fees! But if things get really out of hand with frivolous and vexatious behaviour, the commissioner can step in and order costs.



NAVIGATING THE POST-ARBITRATION MAZE

A PRACTICAL GUIDE TO ENFORCING ARBITRATION AWARDS: FROM CERTIFICATION TO EXECUTION WITH **RULE 40**

ZWELAKHE THWALA

Most arbitrating parties are uncertain about which steps to take after obtaining a favourable arbitration award which the unsuccessful party has failed and/or refused to comply with. Rule 40 (1) of the Rules of Conduct for the CCMA (as amended) provides a practical guide on which referral forms and processes a successful party to arbitration should follow when making an application to certify and enforce their award.

According to Rule 40(1)(a) an application to have a CCMA award certified must be made on LRA Form 7.18, whereas Rule 40(1)(b) provides that an application to have an award issued by a bargaining council must be made on an LRA Form 7.18A.

A party must ensure that their application is made on the correct form based on where their matter was arbitrated, failure thereto may consequently result in their application being rejected due to its defectiveness which may only delay them from enforcing their award expeditiously.

Rule 40 (2) provides that any arbitration award that has been certified in terms of section 143 of the LRA that:

- (a) Orders the payments of an amount of money may be enforced by execution against the property of the employer party by the Sheriff of the court in the Magisterial district where the employer party resides or conducts business.
- (b) Orders the performance of an act other than the payments of money may be enforced by way of contempt of proceedings instituted in the Labour Court.

Rule 40(2) provides two mechanisms that a party may use when enforcing their award. It is important that a party who intends to enforce an award that ordered compensation or costs to make such an enforcement application in terms of Rule 40(2) (a) and the party whose award was ordered for a specific performance i.e. an employer who fails or refuses to reinstate the Applicant and allow them to resume their duties from a particular date then the aggrieved Applicant can make an enforcement application in terms of Rule 40(2).

Rule 40 (3) is specifically applicable if the successful arbitrating party finds that their award includes an award of costs in terms of Section 138(10) of the LRA, a taxed bill of costs in respect of an award of costs, and an arbitration fee charged in terms of Section 140(2) of the LRA.

The amended Rules of conduct for the CCMA have introduced the addition of Rules 40(4) and (5), which provide clarity on the amounts which may be enforced through the execution, and it now authorises the CCMA to collect costs if the Commission provided financial assistance in the enforcement or execution of the award.

Rule 40 (4) provisions for the amount of money that may be enforced through the execution by the Sheriff in terms which is listed as:

- (a) The amount that is ordered to be paid in terms of the arbitration award.
- (b) Any interest accrued on the calculated in terms of Section 143(2) of the LRA. Which is from the date the arbitration award was issued based on the judgment debt rate determined by Section 2 of the Prescribed Rate of Interest Act.
- (c) The Sheriff's costs as permitted in terms of the Magistrate's Court Tariff for Sheriffs.

Rule 40 (5) is applicable when the Commission financially assisted the party in whose favour the award was granted in the enforcement or execution thereof. This Rule provides that the Commission may, if the costs of execution were not realised therein, collect such costs, with interest, directly from the defaulting party. ▪

Rule 40 serves as a detailed guide for the successful party in an arbitration, outlining the specific forms and procedures to certify and enforce their award.

Whether it's executing a monetary judgment or enforcing an act ordered by the court, Rule 40 provides the mechanisms and clarity needed to navigate post-arbitration complexities.



Epilogue

Jaundré Kruger | National Manager

In the complex landscape of labour disputes in South Africa, the Commission for Conciliation, Mediation, and Arbitration (CCMA) is entrusted to promote fairness. The CCMA, rooted in the principles of natural justice, is not merely an institution; it is tasked to be the guardian of equity, striving to resolve disputes swiftly and justly. This booklet, a compilation of CCMA Rules illustrated with real-world examples, serves as a testament to the significance of these rules and the overarching aim of the Commission.

Fostering Fairness through Rules: Each rule encapsulates a commitment to fairness, ensuring that both employers and employees are granted a platform for equitable resolution. The rules are not a mere legal framework but a safeguard of basic rights, a roadmap guiding parties towards amicable settlements. They underline the essence of natural justice, where impartiality, transparency, and due process should reign supreme.

Promoting Efficiency: The CCMA Rules are designed to expedite the resolution process. In a world where time is of the essence, these rules allow parties to navigate the complexities of labour disputes efficiently. By doing so, they minimise the economic and emotional toll that lengthy disputes often impose on individuals and organisations alike.

Empowering Collaboration: The CCMA Rules lay the groundwork for conciliation, mediation, and arbitration - mechanisms that encourage collaboration over confrontation. They recognise that, in many cases, parties share common interests but may be hindered by misunderstandings. Through these processes, the CCMA fosters an environment where compromise and mutual understanding can thrive.

The Pursuit of Natural Justice: Ultimately, the CCMA's core mission is to promote natural justice. This means that decisions are not merely legalistic but are grounded in principles of fairness, reasonableness, and the recognition of human dignity. The rules encapsulate this commitment, reinforcing the CCMA's dedication to resolving disputes in a manner that respects the rights and dignity of all involved.

In conclusion, the CCMA Rules are not just a set of regulations but a testament to the ideals of justice and fairness. This booklet serves as a valuable resource, providing clarity on these rules and demonstrating how they can be applied in real-world scenarios. We hope that it not only equips you with the knowledge to navigate labour disputes but also inspires confidence in the CCMA process and original goal. Together, let us strive for a South Africa where justice is not just an aspiration but a tangible reality for all.

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