

Legal representation at CCMA

Workers can now get a fair deal after the Constitutional Court recognised rights of representation, even at the Commission for Conciliation Mediation and Arbitration (CCMA), by ruling that rule 25(1) was not valid under the Constitution, writes **Tirelo Morule**.

For a long period, legal practitioners and progressive organisations have argued that their constitutional rights and those of workers have been infringed by the CCMA rule 25(1)(c). This rule governs arbitrations conducted in terms of the Labour Relations Act 66 of 1995 (LRA), Rules made by the CCMA pursuant to Section 115(2A) of the LRA which confers upon the CCMA a wide competence to regulate in instances where such arbitration is conducted.

Rule 25(1)(c) provides that, in arbitration before the CCMA, particularly linked to dismissals to do with employees conduct or capacity, the employee may not be represented by a legal practitioner. This is the case unless the commissioner and the other parties consent, or the commissioner concludes that it is unreasonable for a party to deal with the dispute without legal representation: 'having regard to the nature of the questions of law raised by the dispute, its complexity, the public interest and the comparative ability of the parties or their representatives to deal with the dispute'.

BACKGROUND

The application was made by the Law Society of the Northern Provinces and opposed by the minister of Labour and the CCMA,

whilst the minister of Justice and Constitutional Development chose to abide by the decision of the court.

The court contended that when commissioners are charged with arbitrating disputes, they are given sufficient powers including those to subpoena witnesses, place them under oath and enter premises of employers to seize documents and interview witnesses. In exercising these powers, they are required to do so as governed by the law, but carry out their duties in any manner they please with minimum legal formalities.

The court recognised that an arbitration constituted under the LRA is not a court. Thereby, they perform an administrative function, and as the law stands, there is no general representation in areas in which disputes are dealt with except in courts. However, the courts observed that 'under Section 3(3)(a) of the Promotion of Administration of Justice Act 3 of 2000 (PAJA), administrators including presiding officers in administrative tribunals, must consider on a case by case basis whether a person on whose right or legitimate expectation are potentially, materially and adversely affected

by administrative action should be given an opportunity to obtain legal representation.'

Respondents on this matter raised three points In Limine. According to the CCMA In Limine refers to 'a hearing on a specific legal point which takes place before the actual case referred, can be heard. It is a process that addresses the technical legal points, which are raised prior to getting into the merits of the case, and relates to matters of jurisdiction'.

The first point was that, to the extent that the challenge is based on unfair discrimination as prescribed by S9 of the Bill of Rights, the case should have been brought in the Equality Court and not the High Court. In dismissing this point In Limine, the court cited relevant authority particularly that Section 169 of the Constitution which provides that a High Court may decide any constitutional matter except for matters reserved for the Constitutional Court.

The second and third points In Limine were essentially that the disputed sub-rule is permitted by Section 115(2A)(k) of the LRA read together with Section 3(3) of PAJA.

JUDGMENT

In dealing with the reasonableness of the rule the court observed that in all arbitrations before the CCMA, the litigants have an *unrestricted* right under rule 25(2)(b) to appear in person or be represented by a legal practitioner. However, as an exception, in matters relating to the employees *conduct or capacity* including dismissals, the rule imposed restrictions by excluding legal practitioners unless the nature of the case as evaluated by the commissioner before the case warrants it.

The court relied on the fundamental principle that the exercise of public power at every level is only legitimate when lawful. The principle of legality requires amongst others that conduct in the execution of public power must not be arbitrary or irrational. Therefore, the CCMA rule in question ought to have passed that test.

Within the above context, the court dismissed CCMA arguments that ‘disputes about whether individuals or groups of employees have breached company rules or are incapacitated to an extent that justifies their dismissal are less serious, regulated in terms of a detailed code of practice and should be adjudicated swiftly and with the minimum of legal formalities’.

The court proved that ‘in a great number of cases, the employee’s job will be a major asset’ therefore, the loss of a major asset is a serious matter.

The court recognised and accepted the ‘presence of lawyers within the arbitration process will, more often than not, lead to obfuscation, unnecessary complications of the issues and time wasting’. However, the court recommended that as that also occurs in court, the CCMA must follow the court example

and pre-empt such eventuality by appointing qualified commissioners to deal with such aspects.

On the matter of arbitrariness, the court considered a previous decision of *Netherbum Engineering v Mudau NO & Others* where Musi JA found that Section 141(1) of the LRA was rational. He held that the admitted seriousness of arbitrations concerning dismissals for misconduct did not by themselves justify legal representation.

Musi JA found that a commission could routinely determine before the arbitration whether legal representation was appropriate. He further ruled that it was rational to make a distinction because dismissals based on misconduct and incapacity constitutes a majority of the disputes arbitrated by the CCMA.

The court departed from this ruling on the basis that:

- ‘A case which appears before it starts as straight forward’, can turn out to be very complex.
- To identify and distinguish cases without consideration of full merits of each may lead to arbitrariness.

The respondents finally had complained that a change to the current regime which permits legal representation might significantly add to the work load of the CCMA. However, the court dismissed that as well as the ‘state would be obliged to provide the means to ensure that constitutional and labour rights are protected and vindicated’.

SUMMARY OF RULING

In summary the court ruling was as follows:

- a. The respondents did not succeed in establishing that the limitation of the right to legal representation imposed under the rule is reasonable and justified and complied with section 36 of the

constitution. The rule was therefore considered arbitrary.

- b. The CCMA rule 25(1)(c) was accordingly declared unconstitutional and invalid.
- c. The declaration was however suspended for a period of 36 months to enable the relevant parties to consider and come up with a new rule.
- d. The court expressed no opinion whether litigants in such arbitration matters can rely on legal aid.

CONCLUSION

In conclusion three observations can be made. Firstly, whilst the rule has been declared unconstitutional, but suspended for 36 months to allow the CCMA to formulate a new rule, it is in effect still applicable, but commissioners will no doubt take into account that refusing legal representation would be acting on a rule which is unconstitutional.

Secondly, it is difficult to imagine how the rule can further be amended to make restrictions constitutional than the present justification.

Finally, as per public observations made by Johan Botes, a director at Cliffe Decker Hofmeyer: ‘It would be a victory for justice and the rights of employers and employees when every litigant can decide whether or not to use legal representation’. The challenge in my view could arise from employers using their deep pockets by briefing leading legal professionals to dodge workers’ efforts to exercise this right.

An alternative to the above and a key victory could also be if workers are allowed to access legal aid to support legal representation in arbitrations in line with this judgment. ^{LB}

Tirelo Morule is a legal officer with the National Union of Mineworkers.