

CCMA: Right of appearance

By Kim Hawkey

A contentious Commission for Conciliation, Mediation and Arbitration (CCMA) rule that prohibits automatic legal representation in arbitrations concerning dismissals for misconduct or incapacity – which form the bulk of disputes arbitrated by the CCMA – has been declared unconstitutional for arbitrariness.

In the matter of *The Law Society of the Northern Provinces v Minister of Labour and Others* (GNP) (unreported case no 61197/11, 11-10-2012) (Tuchten J), in October the North Gauteng High Court, per Tuchten J, held that there was no basis for treating such disputes any differently to other CCMA arbitrations, in which the same limitation on legal representation does not apply. Further, there was no reason to distinguish between legal and other representatives, such as those from trade unions and employer organisations, who are not so restricted from these proceedings.

After granting the application, the court ordered that the declaration of invalidity be suspended for 36 months to provide time to promulgate a new rule. The CCMA has applied for leave to appeal the judgment; however, for now the ruling stands.

Background

The Law Society of the Northern Provinces (LSNP), on behalf of its member attorneys, approached the court for an order declaring r 25(1)(c) of the CCMA rules unconstitutional on grounds including that it is irrational and it offends against attorneys' constitutional rights regarding the free choice of their profession.

Rule 25(1)(c) states:

'If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite subrule (1)(b), are not entitled to be represented by a legal practitioner in the proceedings unless –

1. the commissioner and all the other parties consent;
2. 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.'

Thus, unlike in all other arbitrations before the CCMA, where litigants have an unrestricted right to be represented by a legal practitioner, in terms of r 25(1)(c), this

right to legal representation is limited in matters relating to an employee's conduct or capacity; that is, in respect of dismissals related to misconduct or incapacity.

Last year the Law Society of South Africa (LSSA) raised similar concerns in respect of the rule. It stressed that r 25(1)(c) was unconstitutional as it unfairly discriminates against members of the legal profession and, further, it denies parties at the CCMA the right to be represented and advised by a representative of their choice.

In the present matter, the respondents were the Minister of Labour, the Minister of Justice and Constitutional Development, the CCMA and its director. All of the respondents opposed the matter, save for the Justice Minister, who indicated he would abide by the court's decision.

As the LSNP successfully made out a case for the absence of rationality of the rule, the court deemed it unnecessary to consider the other grounds it had raised.

In considering the merits of the irrationality argument, the court considered the role of the CCMA, and its administrative function in particular, insofar as it relates to legal representation in arbitrations.

CCMA's role and PAJA

The court noted that the CCMA is an independent statutory body able to determine its rules and that its commissioners have wide powers to determine how arbitrations before them will proceed.

Further, commissioners have the power to subpoena, to enter premises and seize items relevant to the resolution of disputes, and may also mete out punishment for contempt of the CCMA.

In addition, their decisions are binding, with no possibility of appeal, only review.

Despite these powers, the court highlighted that arbitration tribunals under the Labour Relations Act 66 of 1995 (LRA) are not courts and commissioners perform an administrative function, which is significant in respect of legal representation.

'This is important because, as the law stands, there is no general entitlement to legal representation in arenas in which disputes are resolved except in courts,' Tuchten J said, referring to *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2002 (5) SA 449 SCA at para 11 and *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* [2005] 2 All SA 479 (SCA) at para 11.

However, in this regard the court noted that s 3(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) affords administrators discretion to allow for legal representation in 'serious or complex' cases. This section states:

'In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to –

(a) obtain assistance and, in serious or complex cases, legal representation.'

In terms of the discretion afforded by this section, the court noted that an administrator must give a person whose rights are materially and adversely affected by administrative action an opportunity to obtain legal representation in serious and in complex cases, and the court had to determine whether r 25(1)(c) was contrary to this provision.

Rationality

After referring to relevant case law, the court held that as commissioners perform an administrative function, they exercise a public power, which must be lawful and, in terms of the principle of legality, must not be arbitrary or irrational.

In addition, the rules of the commission constitute an administrative decision and must too be rational.

However, the court noted that this did not mean that an administrative decision could be set aside on the basis of irrationality if it is 'not perfect in conception or execution or its purpose could have been better achieved in another way'. Rather, it will only be set aside if it is such that 'no reasonable person could have taken it'.

In ascertaining the rule's rationality or otherwise, the court deemed it necessary to consider the reasons for the rule.

In this regard, the court took into account the evidence of the CCMA and its director to the effect that the restriction on legal representation should be viewed in light of the commission's existence as a result of 'a very particular social and legal context, negotiated by a variety of social partners' and that the rule was as a result of such negotiations.

The director stated:

'[I]t is inherent in the structure of the adjudication of disputes by the CCMA that ... disputes about whether individual[s] or groups of employees have breached company rules or are incapacitated to an extent that justifies their dismissal are less serious, are regulated by a detailed code of practice, and should be adjudicated swiftly and with the minimum of legal formalities.'

However, Tuchten J was not swayed by this view, stating that dismissal is a serious matter:

'I cannot agree that a dismissal of an employee is never a serious matter – for the employee. In a great number of cases, the employee's job will be his major asset. The loss of your major asset is a serious matter.'

Previous case law

The court referred to the matter of *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others* [2009] 4 BLLR 299 (LAC), and distinguished it from the current matter.

The court in the *Netherburn Ceramics* case found that s 140(1) of the LRA, which was repealed and replaced in a similar form in r 25(1)(c), was rational and that the seriousness of arbitrations concerning dismissals for misconduct did not of itself justify legal representation.

However, Tuchten J noted that the court in this matter was dealing with a situation in which s 3(3)(a) of PAJA was ousted because the LRA, which is national legislation, expressly dealt with the question of legal representation. This alone, he said, distinguished the two matters.

Tuchten J further disagreed with the court's finding that because dismissals based on misconduct and incapacity constitute the bulk of the disputes arbitrated by the CCMA (approximately 80% of all arbitrations before the CCMA relate to the fairness of dismissals on the ground of misconduct), it was rational to distinguish these from other arbitrations:

'I respectfully disagree. To identify one category of case *a priori* (by reasoning from assumed axioms) for different treatment irrespective of the merits of each individual case seems to me the essence of arbitrariness' (at para 36).

Decision

The court ultimately held that the rule was unconstitutional and inconsistent with s 3(3)(a) of PAJA.

In this regard, the court noted that r 25(1)(c) does not confer the same discretion as s 3(3)(a) of PAJA, in a serious case that is not complex.

'PAJA was enacted to give effect to s 33 of the Bill of Rights. The impugned subrule is in my view inconsistent with s 33 to the extent that it significantly abridges the discretion of the commissioner in a CCMA arbitration to afford the opportunity for legal representation in a serious but not complex case of dismissal for misconduct or incapacity. The impugned subrule also impermissibly trenches upon the discretion conferred by s 3(3)(a) of PAJA in relation to serious cases' (at para 36).

Further, as a result of the rule's arbitrariness, the court held that the respondents had failed to establish that the limitation of the right to legal representation was reasonable and justifiable.

Impact of the judgment

As mentioned above, the court allocated a 36-month period for the preparation of a new rule; in the meantime r 25(1)(c) continues to apply.

The court noted that its order does not imply that the new rule must provide for 'an unrestricted right to legal representation'.

In respect of the impact of the court order, the respondents argued that permitting legal representation in such matters might 'significantly add to the workload of the CCMA and thus impair its ability to perform its core functions'. However, Tuchten J held that, 'as a matter of principle', he did not believe this contention should be taken into account. In this regard, he referred to *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 (2) SA 24 (CC), in which it was held at para 77:

'Employees are entitled to assert their rights. If by so doing a greater volume of work is generated for the CCMA, then the state is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated.'

Although, in my view, this was the correct approach, the concern raised by the CCMA is valid and must be addressed by the Department of Labour when allocating budget to the CCMA. Further, the potential impact on Legal Aid South Africa will also need to be investigated. The court did not, however, express an opinion on whether a party to such an arbitration should receive legal aid.

Role of lawyers in arbitration

It is worth mentioning that the court, in passing, considered the value of legal representatives in arbitration proceedings.

The court noted that a 'thread that runs through the evidence' of the CCMA is that the presence of lawyers in the arbitration process 'will, more often than not, lead to obfuscation, unnecessary complication of the issues and time wasting'.

On this, Tuchten J responded: 'I have no doubt that in specific arbitrations, all these evils will occur. They occur in court cases as well. The solution devised for the courts is to try to staff courts with presiding officers who can recognise, and deal appropriately with, such conduct.'

He added:

'The other side of the coin, however, certainly in the vast majority of court cases, is that lawyers contribute to the efficient and speedy resolution of disputes by agreeing matters which are not genuinely in dispute and limiting evidence, cross-examination and argument to that which is necessary for the adjudication of the case. There is no reason why that should not be so in CCMA arbitrations as well. That some evidence or cross-examination is ultimately inconclusive is an inevitable consequence of the constitutional imperative that disputes which can be resolved by the application of law must be decided in a fair hearing and a legal system which allows evidence, cross-examination and argument as a means to achieve fairness.'

On a separate point, it is also worth mentioning, for readers who may be interested, that the court considered an interesting point *in limine* relating to whether the Equality Court or the High Court has jurisdiction over such matters.