

The New CCMA Rules - The Ultimate Relief?

Training on this topic (Conducting conciliations and arbitrations in the CCMA) is available (www.laboursmart.co.za/events)

By Johanette Rheeder

Subsequent to the Labour Relations Amendment Act 6 of 2014 coming into operation on 1 January 2015, the CCMA amended its rules to comply with the legislative amendments and numerous court cases commenting and ruling on the current rules. As things go, rules are made to regulate the conduct of the CCMA and the parties appearing before it, and practice and experience eventually require change. These rule changes are also a product of the tri-partheid process followed in NEDLAC and is seen as an “agreement” between the negotiating parties, Labour, Government and Business. Hence, the publication of the Amended Rules for the Conduct of Proceedings before the CCMA in GG 38572 of 17 March 2015. The amended rules became operational on 1 April 2015. Therefore, all cases registered with the CCMA before 1 April 2015, will still be assessed under the old rules and all cases registered subsequent to 1 April will have to comply with the amended rules. Some of the rule amendments need mentioning and all employers and practitioners who appear before or have cases in the CCMA, need to take cognisance of these changes.

Service of documents via email:

The CCMA now allows, when coming to service of documents, service via email. In terms of rule 2, documents may be faxed and emailed at any time to the CCMA. Sub rule 2(3) implies that service may take place after hours as well, however, filing will be (in terms of sub rule 2) between 8:30 to 16:30, therefore, if service takes place after hours, the CCMA will accept service, but it will be deemed to be service on the next day. If service is done via email, then a copy of the email must be attached which indicated successful dispatch of the email and any attachments concerned. The CCMA may also now (rule 5A) provide notice of the conciliation or arbitration hearing, in addition to email or fax, by means of SMS. In terms of rule 18, the CCMA will accept service of referral documents and will allocate a case number, but will not process the claim until such time as the applicant has complied with sub rule 18(2). In terms of this sub rule, referrals must be signed, have attached to it proof of service on the other parties and be accompanied by an application for condonation, if it was filed late.

Filing of documents with the CCMA:

Rule 7 regulates filing of documents with the CCMA. Documents can now be filed with any regional office of the CCMA or any **Department of Labour Office**, at the addresses listed in Schedule 1 to the amended rules, which can take place by handing it in, sending it per registered post, or faxing or emailing it. Original documents must only be filed on request from the CCMA or a commissioner.

Conciliation:

The CCMA may give shorter notice of conciliations (rule 11) if agreed to or if reasonable circumstances require it. If the party who referred the case fails to appear, the CCMA may continue with the proceedings, adjourn to another date within the 30 days period, or conclude the proceedings by issuing a certificate that the matter remains unresolved. The Commissioner may not dismiss the case. Jurisdictional issues are also now regulated post the various cases which dealt with the issue of *points in limine* raised during conciliation^[1]. In terms of rule 14, if it appears during conciliation that a jurisdictional issue is raised, then the Commissioner must require the referring party to show that the CCMA has jurisdiction to conciliate the case, **provided that all jurisdictional issues requiring evidence, may be deferred to arbitration**. This means that parties may raise jurisdictional issues during conciliation, but the Commissioner may defer it to arbitration. Parties need to ensure that if a jurisdictional issue is not resolved at conciliation, they raise it again at arbitration.

In terms of rule 15, a certificate issued by the CCMA must identify the nature of the dispute and the parties as identified in the referral document or as identified by the Commissioner during conciliation. Joinder of parties must take place as soon as possible. Conciliation is private and confidential and without prejudice. The parties may not refer to anything said or admitted during conciliation unless by consent or ordered by a court of law. Any person present at conciliation may also not be called to testify about what happened in conciliation, unless ordered to do so by a court of law.

Representation before the CCMA:

Representation is regulated by rule 25. Practitioners need to carefully peruse the new rule. If a party is represented by a registered trade union, its office bearer or official or member, the Commissioner may request to see the authority of that union to represent the member. Rule 25(1) (a) (4) is a new addition which deals with representation on behalf of an employer's organisation. This party may be represented by any office bearer, official of that party or a director or employee of an (other) employer that is a member of that employers' organisation, authorised to represent that party. This means, effectively that an employer can represent the employer's organisation if authorised.

Sub rule 5 is going to create contention. The view of the CCMA is that consultants cannot represent clients and that employer's organisations may not charge employers for their service in the CCMA. This rule allows the commissioner to exclude representation by any member of an employers' organisation if the Commissioner believes that, inter alia, the representative joined the employer's organisation for the purpose of representing parties in the CCMA. Another reason may be if the Commissioner believes that the presence of the representative would be contra to promotion of inexpensive and expeditious dispute resolution.

Rule 31 applications and arbitrations:

The time periods have been shortened. The application must be brought at least 14 days before the hearing. The application must be supported by affidavit. The opposing affidavit must be filed within 5 days of receipt and a replying affidavit must be filed within 3 days.

The record of proceedings must be kept by digital recording and legible notes (rule 36). Rule 37 A now requires parties to give 7 days' notice of expert evidence to be given, together with a summary of the evidence and documents which will be relied upon. Witness fees have been increased to R 300.00 in terms of the regulations.

Cost orders:

The grounds for cost orders have been clarified in rule 39 and are wider than frivolous and vexatious, which are now just two of the grounds to be considered. The requirements now are that of "law and fairness". This will include the measure of success, fairness to the parties, with prejudice offers made and the conduct of the parties. Further grounds to be considered are the effect of a cost order on the employment relationship, an agreement between the parties on allocation of costs, the importance of the issue in dispute or any other relevant factor. Reasonable disbursements may also be awarded. Cost orders may only be made where both parties are represented by legal practitioners. A cost award may also not exceed R 6000.00 for the first day and R 4000.00 for any additional days. No preparation costs are allowed.

Certification of awards:

In compliance with the LRAA, a certified award may be executed directly by the Sheriff without first approaching the Labour Court. Certified orders to perform an act may be enforced directly by way of contempt proceedings in the Labour Court.

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[1] *Bombardier Transportation (Pty) Ltd v Mitiya and Others* (JR 644/09) [2010] ZALC 34; (2010) 31 ILJ 2065 (LC) ; [2010] 8 BLLR 840 (LC) (11 March 2010)