

WHO CAN REPRESENT PARTIES AT CCMA PROCEEDINGS?

By Yoan Bothma

The Commission for Conciliation, Mediation and Arbitration, commonly known as the “CCMA”, was established in 1995 with the intention to create a dispute resolution forum where labour disputes could be resolved speedily and expeditiously, with the minimum legal formality and procures. As part of the procedures of the CCMA, it was decided to limit legal representation (and long, formal litigious disputes) in dismissal and incapacity cases and to make the CCMA accessible to all employees and employers the paramount objective. In reality however, a lot of employees are not represented by a union, and if the employee cannot afford an attorney, the employee is on his own, sometimes against a seasoned Human Resources manager or in-house legal adviser. Many employees would end up at Community advice offices for legal advice, however cannot be represented by such a body as a consequence of the CCMA rules.

Of relevance is Rule 25 of the Rules of the CCMA, (as becoming effective on 1 April 2015). This rule sets out requirements for representation in the CCMA and states that the right to legal representation is restricted if disputes about fairness of dismissals relate to conduct or capacity. In terms of this rule, any party can be represented by an employee or Director of the employer or by an official, office bearer or member of a registered union. Therefore, during conciliation, no attorneys or consultants are allowed. During the arbitration stage, an employer or employee can be represented by a legal practitioner, employee or director of the employer or a union official, member or office bearer representing the employee. In the case of dismissal or incapacity, a legal representative can only appear on consent of the other party and the Commissioner. Should a party object to representation, the Commissioner must consider and determine the objection.

The unfairness of this rule was challenged by the Casual Workers Advice Office in terms of Sections 23 (1) and Section 33 (1) of the *Constitution of the Republic of South Africa*, section 23 (1) allowing every *person* the right to fair labour practises and the right to legal representation and section 33 (1) allowing people the right to fair and lawful administrative action.

The matter of *CWAO & Others v CCMA & Others* (J645/16) came about in 2016 and an order and postponement (as part of a settlement between the parties) was given on 20 September 2016 by Van Niekerk J. The learned Judge interpreted rule 25 and ruled that a Commissioner has discretion to authorise any party to represent at CCMA proceedings on good cause shown. The CCMA was ordered to file a Practise Note within 10 days, directing Commissioners that they have a discretion to allow representation before them by parties other than those mentioned in rule 25, and to make specific provision for this discretion to be exercised in proper circumstances to permit representation by Community Advice Officers, registered in terms of the Non-Profit Act 71 of 1997.

The practise Note now deals with applications for representation at CCMA proceedings by persons other than those contemplated by Rule 25. Rule 25 was therefore amended to include sub-rule 25(2) that states that commissioners may act in any manner that is expeditious to achieve the objections of the Labour Relations Act and in doing so, to prefer substance rather than form, unless the Labour Relations Act states otherwise.

Rules 25(1) and (2), if read together, expands the discretion of Commissioners to depart from the rules where necessary to achieve the objectives of the Act and this discretion is wide enough to condone non-compliance with Rule 25, on good cause shown, and in the spirit of the Act and in relation to representation.

A party who wish to represent an applicant must therefore lodge an application at the CCMA arbitration set down, to allow a person other than the persons as per Rule 25, to represent a party at the CCMA, and this application must be dealt with in accordance with the provisions of Rule 31, unless the Commission directs otherwise.

In determining the merits of the application and whether good cause has been shown, Commissioners should consider various factors such as the unreasonableness to expect applicants to deal with disputes without representation, after considering:

- nature of questions of law and facts raised by the dispute;
- the complexity of the dispute;
- public interest (if applicable);
- ability of parties to deal with the disputes on their own;
- any other relevant factors;
- why someone as envisioned in Rule 25 cannot represent the party;
- the ability of the proposed representative;
- whether the proposed representative is subject to oversight and discipline of a professional body;
- if the proposed representative will contribute to the fairness of the proceedings and the expeditious resolution of the dispute;
- prejudice to the other party; and
- any other relevant factors.

As a result of the above, Commissioners must also consider applications for representation by organisations such as the Community Advice Offices, who are registered in terms of the non-Profit Organisations Act 71 of 1997 and should consider various factors such as:

- that these offices do not have an automatic right and good cause must be shown to the Commissioner;
- complex matters where employees would benefit from representation by lawyers or trade union representatives, but where the parties are

- unable to access their services; and
- proof of registration of the community advise office.

Although this case deals with Community Service Offices, the effect of this order is that any person can potentially now apply to the CCMA Commissioner to represent a party before him or her. Such an application must be considered by the Commissioner and can be granted on good cause shown. Applicants should consider proper argument on matters such a prejudice the applicant may suffer if representation is denied, the requirement of speedily resolution without legal formalities, complexity of the matter and the fact that representation is not an automatic right.

Yozan Bothma is a labour law attorney and writes articles for Labour Smart Pty Ltd