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Legal representation at the CCMA – a constitutional right?

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Rule 25(1)(c) of the CCMA

At present, the approach adopted by the Commission for Conciliation, Mediation and Arbitration (CCMA) in regard to parties' rights to legal representation is that there is no absolute right to legal representation at any stage of the proceedings.

Rule 25 of the current rules of the CCMA provide a general rule that, in arbitration proceedings before the CCMA, although a party to the dispute may appear in person or be represented by a legal practitioner, the right to representation by a legal practitioner is restricted 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.

This restriction can be relaxed if the commissioner and all the other parties consent, or if the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering relevant factors, such as

- the nature of the questions of law raised by the dispute;
- the complexity of the dispute;
- the public interest; and
- the comparative ability of the opposing parties or their representatives to deal with the dispute.

Any party to the dispute can bring an application to the CCMA arguing that he/ she should be allowed legal representation and would be required to motivate or justify why representation should be allowed on the grounds set out above. There is an abundance of case law which deals with investigations into these factors and the circumstances in which such applications will be successful, or otherwise.

The motivation behind this restriction would appear to be a general appreciation that the CCMA is intended to be a forum in which labour disputes can be speedily and expeditiously decided with a minimum of legal formalities and procedure; there is a clear apprehension that the right to be represented by legal representatives will curtail the ability of the CCMA to operate within these parameters and will unnecessarily complicate and lengthen proceedings.

Arbitration at the CCMA

Be that as it may and notwithstanding that parties to arbitration at the CCMA may apply for legal representation, there has long been dissatisfaction of the general restriction of a party's right to avail himself of legal representation. Objections to this general restriction have been brought on the basis of

- the right to fair labour practices, in terms of Section 23(1) of the Constitution of the Republic of South Africa ("the Constitution") which provides that everyone has the right to fair labour practices. Arguably, the right to legal representation in arbitration disputes may form part of such general constitutional right;
- the right to fair and lawful administrative action, in terms of Section 33(1) of the Constitution which requires that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

In light of the disputes which have arisen about parties' rights to be legally represented at all stages of CCMA proceedings, the recent case of Law Society of the Northern Provinces v Minister of Labour and Others JS61197/11, provides some guidance and shows that changes to the CCMA can be expected.

This case, decided in the Pretoria High Court, found that Rule 25(1)(c) of the CCMA rules is unconstitutional, on the basis that the restrictions on legal representation imposed by the CCMA rules could not amount to a reasonable or justifiable restriction on parties' constitutional rights, in particular section 33 of the Constitution which provides for rights in regard to fair administrative action.

The court also found that the restrictions in Rule 25 of the CCMA was inconsistent with requirements of The Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), which was intended to give effect to Section 33 of the Constitution. The Court decided that the restrictions which arose from Rule 25 were arbitrary and concluded that the CCMA should amend its rules to provide for a right to legal representation. Interestingly, the court did no go so far as to say that the CCMA would have to be completely unrestricted in regard to allowing legal representation.

Conclusion

The order made by the court was that the declaration of invalidity of Rule 25(1)(c) would be suspended for 36 months, to allow the CCMA to consider and promulgate a new rule. This order is a common sense approach, so as to not result in a situation in which Rule 25(1) (c) is declared invalid without a replacement, which could result in administrative difficulties for the CCMA.

However, what the amendments to Rule 25(1)(c) will be, and whether these amendments will prove reasonable in light of the rights of parties in terms of the Constitution and PAJA, remains to be seen.

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Bradley Workman-Davies

Director

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