

EMPLOYMENT

Sticking (it) to the rules? Sometimes, unless that would be unfair

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CCMA Rules

South African labour legislation sets up fundamental structures for the resolution of labour related disputes, including the establishment of the Commission for Conciliation, Mediation and arbitration (CCMA). In addition, the Labour Relations Act, 66 of 1995 (LRA) establishes rules for the conduct of proceedings before the CCMA.

These rules are intended to ensure that there is regularity and consistency in the dispute resolution processes which are administered by the CCMA. These rules ordinarily need to be adhered to fairly strictly; however, it must always be borne in mind that South African courts approach the topic of employment rights from the perspective of equity and fairness, and it is sometimes acceptable for the rules to be bent in order to ensure that the parties are afforded a fair opportunity.

When a dispute is referred to the CCMA, it is automatically set down for a con/arb process, which envisages the holding of firstly, an informal conciliation meeting at which the parties will attempt to agree to a settlement or resolution of the matter and thereafter, only if the conciliation is unsuccessful the more formal arbitration, at which stage the CCMA may issue a binding award.

However, any party to the dispute is able to object to con/arb, which has the effect that the arbitration is split from the prior conciliation, and would not be heard immediately thereafter. Only if the conciliation fails will the employee be entitled, after having been issued a certificate of no outcome by the CCMA, to request that the matter be set down for arbitration at a later date. In accordance with the [CCMA rules](#), the objection to con/arb must be lodged by a party not less than seven days prior to the scheduled date of the con/arb proceedings.

The Labour Court in the case of *Valinor Trading 133 CC t/a Kings Castle v The CCMA and Others* (JR292/19) [2023] ZALCJHB had to determine whether a commissioner is empowered to ignore an objection purely on the basis that it was not raised within the time constraints, being within at least seven days before the enrolment date, as provided for in the CCMA Rules.

In this matter, a claimant (who had entered an independent contracting relationship with Valinor, and who considered the nature of this relationship to be one which is an employer and employee relationship, referred a dispute to the CCMA alleging that, upon the contracting relationship ceasing, that he had been unfairly dismissed. The dispute was enrolled for con/arb on 10 September 2018, following an objection to the immediate commencement of the arbitration by Valinor which was received three days before the scheduled date.

Notwithstanding, Valinor's objection to the commencement of the arbitration, the CCMA proceeded with commencement of the arbitration in the absence of the employer. This was on the basis that the objection had not been sent by Valinor within the seven day period required by the CCMA rules. The CCMA issued a default award, which Valinor sought to have rescinded. The CCMA dismissed the rescission application, which was followed by a second rescission application. The second rescission application was also dismissed by the commissioner. Valinor launched an application to review and set aside both rulings made by the CCMA.

The Labour Court considered the CCMA Rules, which provides that a party who intends to object to a dispute, must deliver a notice to the CCMA and other party at least seven days before the scheduled date. The Court held that statutory provisions must be interpreted in line

with the Constitution and other provisos in the LRA. The Court further held that the CCMA Rules are discretionarily, and have been published to regulate and not prescribe.

The Court found that "*where a party has objected, irrespective of the timing of the objection, a commissioner is not empowered to proceed with the arbitration or to ignore the objection. Should a commissioner ignore the object and proceed, the decision that shall follow is a nullity and ought to be considered as such*". The Court found that the right to submit an objection cannot be taken away by the Rules nor can it be ignored by a commissioner.

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This case highlights the importance of the fact that both employers and employees or parties to a dispute must be aware of the fact that a late objection to the commencement of arbitration proceedings is still effective. A commissioner cannot ignore and decide to proceed to commence arbitration proceedings merely because a party to the proceedings has objected outside of the prescribed period. Therefore, employers, employees or parties to a dispute who fall short to submit a notice to object to arbitration proceedings within the prescribed time frames should not be discouraged or deterred from submitting an objection notice before the commencement of the arbitration proceedings. A late objection does not cease to be an objection.



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