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The admissibility of evidence related to discussions held during a conciliation hearing

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ISSUE

Can the Labour Court receive and rely on evidence related to discussions held during a conciliation hearing at the CCMA?

SUMMARY

Certain evidence related to discussions held during a conciliation hearing at the CCMA, such as evidence of the nature of the dispute, is admissible in the Labour Court and is not privileged.

COURT'S DECISION

In *September and Others v CMI Business Enterprise CC* (2018) ZACC 4, the Constitutional Court was tasked with interpreting and applying rule 16 (in its previous form) of the Rules of the Commission for Conciliation, Mediation and Arbitration (CCMA Rules). The central issue was whether the Labour Court could admit evidence of what was said during CCMA conciliation proceedings.

The applicants (the employees) started employment with the CMI Business Enterprise CC (the employer) in 2009. The employees resigned in 2011, alleging that the employer made the working conditions intolerable through racial discrimination that amounted to physical, verbal and mental abuse. The employees lodged two referral forms with the CCMA, the first in respect of an alleged unfair labour practice and the second in respect of alleged unfair discrimination. The employees described the outcome they desired as "*employer to stop discriminating us*". The employees later contended that during the conciliation hearing, it became apparent that their dispute was one of constructive dismissal. The commissioner issued a certificate of outcome, certifying that the dispute of "unfair discrimination" was unresolved and that the matter could be referred to the Labour Court ("LC").

The employees then instituted proceedings in the LC, seeking an order that their resignations amounted to automatically unfair dismissals based on racial discrimination and sought compensation. The employer opposed their claim, arguing that the employees had absconded from their employment and that the LC did not have jurisdiction to entertain the dispute. However, the employer failed to oppose the claim in accordance with the rules and practices of the LC, and the matter was treated as unopposed. The LC granted default judgment in favour of the employees, holding that it was "satisfied that the employees were constructively dismissed" and that their dismissal was automatically unfair as it was based on race. The employer later applied to the LC for the rescission of the default judgment. The employer argued that the LC lacked jurisdiction to entertain the matter, because the nature of the dispute had changed from what was referred to the CCMA (discrimination) to constructive dismissal. The employees responded saying that the true nature of the dispute became apparent during the CCMA conciliation proceedings with the assistance of the commissioner, and, on this basis, the Labour Court did have jurisdiction to consider their dispute.

The LC acknowledged that before arbitration or adjudication can occur, the dispute must have been referred to conciliation. The LC further acknowledged that rule 15 of the CCMA stipulates that the nature of the dispute is determined either by what is contained in the referral document or by what the commissioner identified during the CCMA proceedings. The LC held that the commissioner must determine the

nature of the dispute in order to conciliate the dispute, and in doing so the commissioner cannot be precluded from enquiring into the nature of the dispute because the referrer of the dispute did not absolutely accurately describe the dispute. The LC concluded that it had jurisdiction, as there was a referral and a certificate issued. Subsequently, the employer was granted leave to appeal.

In the Labour Appeal Court ("LAC"), the central issue was whether the constructive dismissal based on unfair discrimination had been conciliated before the referral of the dispute to the LC. The LAC held that the referral form and certificate of outcome made no mention of unfair dismissal, thus the Labour Court was incorrect in concluding that the referral was for unfair discrimination. Furthermore, the LAC held that the evidence of what occurred during the conciliation proceedings was inadmissible in the subsequent LC proceedings.

The Constitutional Court ("CC") then granted the employees leave to appeal. The CC held that a commissioner is not bound by a party's categorisation of the nature of the dispute and that the parties are not bound by the commissioner's description of the dispute in the certificate of outcome, as supported by rule 15 of the CCMA Rules and the judgment in *NUMWSA v Driveline* 2000 (4) SA 645 (LAC). The CC stated that the LAC adopted a formalistic approach that failed to take into account the purpose and context of the LRA. The CC then assessed whether there was compliance with section 191 of the LRA, before the matter was referred to the LC. In this regard, the CC considered whether compliance of section 191 can be based on evidence of what occurred during CCMA conciliation. The CC noted that the LAC adopted the employer's argument that rule 16 of the CCMA rules stipulated that conciliation proceedings may not be disclosed. The CC interpreted the pre-amended rule 16 to mean that evidence as to the nature of the dispute, is not privileged, as it does not relate to the substance of the proceedings, but is merely descriptive. The CC concluded that to determine whether a matter referred to the LC for adjudication had first been referred to the CCMA for conciliation, the first point of reference is the referral documents, but if there is a dispute as to the nature of the dispute referred to the CCMA, then regard may be had to evidence outside of these documents.

IMPORTANCE OF THIS CASE

The CC's interpretation of rule 16 of the CCMA Rules, despite the amendments in 2015 thereto, has a significant impact on similar cases launched before the amendment. The CC's interpretation of the pre-amended rule 16 reiterates the fundamental purpose of the LRA, which is to ensure that an employee's right to fair labour practices is guaranteed. Employers should note that an employee's dispute is not only characterised by what the employee has referred to the CCMA for conciliation, as an employee's dispute can later be developed by what was said during the conciliation.



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