



TO ALL: REGIONAL MANAGEMENT AND ALL CCMA COMMISSIONERS

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION DIRECTIVE NO. 1 OF 2019

APPEARANCE OF LEGAL PRACTITIONERS AT CCMA PROCESSES: RULE 25(1) OF THE CCMA RULES

1. PURPOSE

The Purpose of this Directive is to give commissioners direction on the interpretation and application of Rule 25(1) against the provisions Section 25 of the Legal Practice Act 28 of 2014 (hereinafter referred to as the Legal Practice Act).

2. BACKGROUND

- 2.1. The Legal Practice Act, which regulates the legal profession came into effect on 1 November 2018 and thus repealed the then Attorney's Act 53 of 1979, which previously regulated the attorneys profession.
- 2.2. The amended CCMA Rules came into effect on 1 January 2019 and regulate CCMA processes, this including representation of parties at the CCMA.
- 2.3. It has come to our attention that there are allegations of conflict between the CCMA Rules, promulgated under the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA) and the Legal Practice Act, in as far as the appearance of legal practitioners at the CCMA is concerned.

3. LEGAL POSITION

- 3.1. Section 25 of the Legal Practice Act provides that:
"a legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution"

- 3.2. The above provision closely mirrors the provision previously found in section 8 of the Attorneys Act.
- 3.3. Section 115(2A)(k) of the LRA empowers the CCMA to make rules regulating the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings.
- 3.4. Section 210 of the LRA provides that:
“If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending this Act, the provisions of this Act will prevail.”
- 3.5. In giving effect to the provisions of section 115(2A)(k) of the LRA, the CCMA enacted Rule 25, the relevant provisions of which read as follows:
- (1) *“(b) Subject to paragraph (c), in any arbitration proceedings a party to the dispute may appear in person or be represented only by - (i) a legal practitioner; (ii) a candidate attorney; or (iii) an individual entitled to represent the party at conciliation proceedings in terms of sub-rule (1)(a).*
- (c) If the dispute being arbitrated is referred in terms of section 69(5), 73 or 73A of the BCEA or 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, a party is not entitled to be represented by a legal practitioner or a candidate attorney in the proceedings unless -*
- (i) the commissioner and all the other parties consent;*
- (ii) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering - (a) the nature of the questions of law raised by the dispute; (b) the complexity of the dispute; (c) the public interest; and (d) the comparative ability of the opposing parties or their representatives to deal with the dispute.*
- (e) No representation by a legal practitioner or candidate attorney shall be allowed in facilitations of large scale retrenchments as contemplated in section 189A(3).”*
- 3.6. Section 25 of the Legal Practice Act qualifies legal practitioners to appear in different courts and tribunals, having met certain requirements. It does not seek to impose, without any limitations, the appearance of legal practitioners to such courts and/or tribunals.
- 3.7. The Legal Practice Act regulates attorneys and does not seek to regulate the operation of the justice system, specifically, the processes of various courts and tribunals.

- 3.8. The appearance of legal practitioners in any court and/or tribunals remains subjected to the rules of that particular court or tribunals, which court or tribunals is entitled to regulate any appearance by legal practitioners before it.
- 3.9. The enactment of Rule 25 of the CCMA Rules represents a proper exercise of power by the CCMA and in no way conflicts with the provisions of the Legal Practice Act.
- 3.10. Even if there was a conflict between the LRA and the Legal Practice Act, which there isn't, the LRA, which gives the CCMA the power to regulate who may represent parties at any of its processes would prevail, and thus the proper exercise of such power cannot be considered outside the provisions of the empowering legislation.
- 3.11. The previous legislation regulating attorneys, equally entitled attorneys and candidate attorneys appearance at various courts and tribunals upon meeting certain requirements. Notwithstanding this, the appearance of such attorneys and candidate attorneys remained subject to the Rules of the relevant courts and/or tribunals, inclusive of the CCMA Rules, which limited the right of appearance of attorneys as it currently does and even prohibited the appearance of candidate attorneys at its processes, despite the Attorneys Act having provided otherwise. Thus, the Legal Practice Act did not introduce any new provision in this regard.
- 3.12. Therefore, legal practitioners and candidate attorneys do not enjoy an automatic right of appearance at any of the CCMA processes.
- 3.13. The appearance of legal practitioners and candidate attorneys at CCMA processes is subject to the CCMA Rules and limitations contained therein.

4. DIRECTIVE

4.1. In the premise of the above, commissioners are directed to apply the provisions of Rule 25(1) as follows:

4.1.1. Legal practitioners and candidate attorneys do not have an automatic right of appearance at any of the CCMA processes.

4.1.2. ***During conciliation processes***, a party to the dispute may appear in person or be represented only by:

- (a) Any member, office bearer or official of a party's registered trade union or registered employers' organisation;
- (b) A director or employee of that party and, if a close corporation, also a member thereof.

- 4.1.3. **During an arbitration process**, a party may appear in person or be represented by:
- (c) Any member, office bearer or official of a party's registered trade union or registered employers' organisation;
 - (d) A director or employee of that party and, if a close corporation, also a member thereof.
- 4.1.4. If the dispute being arbitrated is about a *dismissal involving misconduct, incapacity due to ill-health; incapacity due to poor work performance, a compliance order or written undertaking and/or monies owing, including claims for national minimum wage*, legal representation is ONLY allowed if:
- (e) The commissioner and all the other parties agree; or
 - (f) The commissioner, on application, decides that it would be unreasonable for a party to proceed without such representation.
- 4.1.5. A legal practitioner or candidate attorney can, without a formal application, represent a party at all other arbitration hearings.
- 4.1.6. **During facilitation processes**, legal representation is not allowed.

Issued by:

Cameron Sello Morajane
CCMA Director

Effective date: Immediately upon issue