The Constitutionality of rule 25 of the CCMA Rules

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A word of thanks

To my family and, in particular, to my fiancée who believed in me and encouraged me through tough times I will forever be grateful. I give special thanks to my Heavenly Father, in whom I found a Father and a Protector, I will forever praise your name.

Thanks….

Abstract

This study focuses on the impact of legal representation in general as well as on CCMA proceedings involving unfair dismissals relating to conduction on capacity.

The study also touches on the common law position before the enactment of Labour Relations Act 28 of 1956 and Labour Relations Act 66 of 1995. Rule 25 of CCMA rules which makes provision that legal representation at CCMA arbitration proceedings relating to fairness of dismissal and party has alleged that the reason for dismissal relates to the employees conduct on capacity, the party is not entitled to be represented by a legal practitioner.

The dissertation analyses the effect of this provision on the Constitutional rights to legal representations well as rights relating to fair procedure.

Refusal of legal representation in certain instances is justified in the right of legislative requirements on obligation placed particularly on the arbitrator legislative measures which, justifies refusal of legal representation at CCMA that cannot be imposed without giving consideration to the Constitution.

The study will highlight the South African case on position with regards to legal representation at CCMA.

A literature study will be done using current and researched sources such as textbooks, law journals, and legislation, case law, conferences papers and internet sources. Different rights will be weighed up through literature sources.

Keywords: Legal representation challenges, fairness of dismissal, arbitration proceedings, misconduct, incapacity, administrative tribunals, constitutional impact

Opsomming

Hierdie studie is toegespits op die uitwerking van regsverteenwoordiging in die algemeen asook op KVBA-verrigtinge in verband met onbillike ontslag wat verband hou met gedrag of bekwaamheid.

Die studie raak ook aan die posisie in die gemenereg voor die inwerkingtreding van die Wet op *Arbeidsverhoudinge* 28 van 1956 en die Wet op *Arbeidsverhoudinge* 66 van 1995. Reël 25 van die KVBA-reëls maak voorsiening vir regsverteenwoordiging tydens KVBA-bemiddelingsprosedures wat verband hou met billikheid van ontslag, en vir ’n party wat beweer dat die rede vir ontslag verband hou met die werknemer se gedrag of bekwaamheid, om deur ’n regspraktisyn verteenwoordig te word.

Die skripsie ontleed die uitwerking van hierdie bepaling op die grondwetlike regte tot regsverteenwoordiging asook op regte wat met billike prosedure verband hou.

Weiering van regsverteenwoordiging in sekere gevalle is geregverdig in die lig van wetlike vereistes oor plig, wat in die besonder op die wetgewende maatreëls van die arbiter van toepassing is, wat weiering van regsverteenwoordiging by die KVBA motiveer wat nie voorgeskryf kan word sonder om die Grondwet in berekening te bring nie.

Die studie sal beklemtoon wat die geval in Suid-Afrika is met betrekking tot regsverteenwoordiging by die KVBA.

’n Literatuurstudie sal gedoen word deur huidige en nagevorsde bronne te gebruik soos handboeke, regstydskrifte, en wetgewing, hofsake, konferensielesings en internetbronne. Verskillende regte sal deur middel van literatuurbronne opgeweeg word.

Sleutelwoorde: uitdagings rakende regsverteenwoordiging, billikheid van ontslag, arbitrasieverrigtinge, wangedrag, onbevoegdheid, administratiewe tribunale, grondwetlike impak.

List of abbreviations

CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
ILJ	Industrial Law Journal
ILO	International Labour Organisation
JSC	Judicial Service Commission
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relation Act
LSNP	Law Society of Northern Province
PAJA	Promotion of Administrative Justice Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SCA	Supreme Court of Appeal

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1 Introduction

This research will deal with the South African legal position with regard to legal representation at the Commission for Conciliation, Mediation and Arbitration in disputes involving fairness of dismissal relating to an employee's conduct or capacity. The effect of the judgement in *Law Society of Northern Province v Minister of Labour*[1] regarding the Constitutionality of rule 25 of Commission for Conciliation, Mediation and Arbitration rules on parties to be represented by legal practitioners in the CCMA will be looked at.

The new democratic order has among others sought to amend and restructure labour law in South Africa hence the introduction of the interim Constitution which among others entrenched labour rights in the form of a right to fair labour practice, right to freedom of association and collective bargaining and the right to strike and lockout. In 1995 labour law took a major transition by introduction of the *Labour Relations Act* 66 of 1995 (herein after referred to as the LRA)[2] which has extremely emphasised protection of labour rights as entrenched in the interim Constitution[3] and ultimately the final draft which was adopted in 1996.

The most important forum which emerged as a result of the enactment of LRA is Commission for Conciliation, Mediation and Arbitration (herein after referred to as CCMA) which serves as one of the bodies entrusted with employment dispute resolution. This institution was established with effect from 1 January 1996 under section 112 of the LRA.[4]

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1 *Law Society of Northern Provinces v Minister of Labour* 2013 22 HC 1.25.1.

2 S 1(a) of the LRA provides that purpose of the Act is to give effect to and regulate the Fundamental rights conferred by s 27 of the Constitution.

3 Act 200 of 1993. This has now been amended in the *Labour Relations Amendment Act* 6 of 2014.

4 S 113 of LRA provides that the commission is independent of the state, any political party, trade Union, employer, employers' organisation, federation of trade unions or federation of employers' organisations.

The CCMA mandate to conciliate all disputes referred to it poses two distinct sets of challenges for the organisation.[5] On the one hand, it is required to provide expeditious conciliation in a very large number of rights disputes that may be referred to arbitration and adjudication. The overwhelming majority of these cases are claims of unfair dismissal. On the other hand, the CCMA is required to mediate unresolved collective bargaining disputes ranging from disputes involving single employers to disputes arising out of sectoral bargaining in major sectors of the economy,[6] if the LRA provides for the intervention of the CCMA.[7]

The CCMA as a statutory body falls within the ambit of section 33 of the *Constitution.* Disputes concerning organisational rights, collective agreements, dismissals and unfair labour practices may be referred to this body for resolution. Section 140(1) of LRA dealt with arbitrations about dismissals for reasons related to conduct or capacity of an employee. Other forms of dismissals such as operational requirements, strike dismissals and discrimination must be referred to the Labour Court. In 2002 LRA was amended with an intention of allowing employees to refer cases of dismissals based on operational requirements to arbitration. The aim of arbitration being to find quickly, less costly and informal solution to disputes. The process, therefore, should seek to avoid complicated legal processes, hence the introduction of rule 25 of CCMA Rules, which restricted legal representation. Rule 25(1) (a) states that parties may appear in person, or be represented only by director or an employee of that party or, in case of a close corporation, a member, and by any member, office bearer or official of that party's registered trade union or registered employers' organisation.

If a dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for dismissal relates to the employee's conduct or capacity, the parties are not entitled to representation by legal practitioner in the proceedings unless the commissioner and all the other parties consent to it, or the arbitrator allows it due to the nature of the questions of law raised by the dispute,

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5 Benjamin "Assessing South Africa's CCMA" 1.
6 Benjamin "Assessing South Africa's CCMA" 1.
7 See s 24 of the LRA.

its complexity, public interest and comparative ability of the opposing parties or their representatives to deal with the dispute.[8] Section 213 of LRA refers to a legal practitioner as any person admitted to practice as an advocate or attorney in the Republic.

Although representation is not completely excluded, there have been a number of court cases to challenge the Constitutionality of rule 25 of the CCMA. The case of *Law Society of Northern Province V Minister of Labour*[9] almost changed the legal position on this aspect when LSNP challenged this rule on the basis that it violated the Constitutional guarantees of fair administrative action.

2 The right to legal representation in general

Section 34 of the *Constitution* provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. With regard to section 34 reference will be made to the case of *Badingdawo v Head of the Nyanda Regional Authority: Hlantlalala v Head of the Western Tembul and Regional Authority*,[10] where the applicants in the first application had been convicted by the regional authority court and sentenced to three years imprisonment. The applicant in the second application was the defendant in a civil action before a regional authority court. The applicants challenged the Constitutionality of various sections of the *Regional Authority Courts Act* 13 of 1982. The courts established in terms of the Act had concurrent jurisdiction with the magistrate courts within its regional authority area. The applicants in the first application challenged various sections of the Act citing amongst others that, the Act violated independence of the judiciary and right of the accused to a fair trial in contravention of section 8 of the *Constitution of the Republic of South Africa.*[11] The applicant in the second application relied on the

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7 Rule 25(1)(c) of CCMA Rules.
8 *Law Society of Northern Province v Minister of Labour* 2013 22 HC 1.25.1.
10 *Badingdawo v Head of the Nyanda Regional Authority: Hlantlalala v Head of the Western Tembul and Regional Authority* 1998 2 SACR 16 (TK).
11 200 of 1993.

fact that the Act denied litigants in civil cases the right to legal representation in violation of section 22 of the interim Constitution.

The court held that as the regional authority courts exercised concurrent jurisdiction with the magistrate court, these courts had to adjudicate on complex statutory and common law matters. In criminal matters there were statutory offences where the penal jurisdiction was not the limited jurisdiction in terms of the *Criminal Procedure Act* 51 of 1977. As the substantive law justification relied upon for the prohibition against legal representation hardly sufficed for the purpose of the limitation clause contained in section 33 of the interim Constitution. The court held further that even though there was no specific mention in section 22 of the Constitution of right to legal representation in civil cases, the right of access to court and having justiciable disputes settled by courts would be rendered entirely nugatory if, in respect of legal proceedings, it were to be held that there was no Constitutional right to legal representation. With regard to section 7 of the Act,[12] the court found that it violated section 22 and 25(3) of the interim Constitution and as no justifiable limitation in terms of section 33(1) of the Constitution had been proffered, the prohibition against legal representation had to be struck down in civil and criminal proceedings in regional authority courts.

In a case of *Sidumo v Rustenburg Platinum Mines Ltd*[13] it was held that the functions performed by CCMA clearly fall within the terms of section 34 of the *Constitution*. The court held further that the CCMA is an independent tribunal established by the LRA.[14] It determines disputes on a range of matters that arise between workers and trade unions, on the one hand, and employers, on the other hand. Its hearings must accordingly be fair, public hearings as contemplated in section 34. Ngcobo J held further that it is not clear that this requirement tracks identically the provisions of section 33, which require administrative action to be lawful, reasonable and procedurally fair and also requires that those whose rights

12 S 7 of *Regional Authority Courts Act* 13 of 1982, prohibited legal representation in proceedings before Regional authority.
13 *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) at pars 139 and 140.
14 S 113 of the *Labour Relations Act* 66 of 1995.

have been adversely affected receive written reasons for the action.[15] It was held that the matter should not be given a final answer as the CCMA's proceedings are bound both by the Constitutional provisions of section 34 and those of section 33. Emphasis on the functions of CCMA as contained in section 33 is that, the intention is for the tribunal to offer cheaper, speedier and more accessible justice, essential for the administration of welfare schemes involving large numbers of small claims. The court processes are expensive and slow. The defects are those of merits with the intention of providing the highest standard of justice; generally speaking, the public wants the best article, and is prepared to pay for it. Administration of social services does not require the best possible article at any price but the best article that is consistent with the efficient administration. Disputes must be resolved quickly.

In *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee*[16] the complaint relates to refusal to allow the first appellant to be represented by the lawyer of his choice during a disciplinary enquiry and the insistence, if he desired to be represented, upon him being represented by either a student or a member of the staff of Pentech. The refusal in this case was based on rules of the Pentech which provide that the student may conduct his or her own defence or may be assisted by any student or a member of staff of the Technikon. Such representative shall voluntarily accept the task of representing the student. If the student is not present, the committee may hear the case, make a finding and impose punishment.[17] The court then held a view that entitlement as of right to legal representation in forums other than courts of law has long been a bone of contention. In *Yates v University of Bophuthatswana*[18] the court dealt with the question of procedural fairness in administrative action where legal representation was not allowed. The applicant in this case was asked to address the committee which held an enquiry in his matter and the applicant stated that he was not represented and that the reason for this was that his counsel was ill. The

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15 Ss 33(1) and (2) of the *Constitution*.
16 *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 449 (SCA).
17 Rule 10.2.11 (1)(viii).
18 *Yates v University of Bophuthatswana* 1994 3 SA 815 (BGD) at 834.

applicant was ultimately dismissed. The issue of representation was then raised as one of the reasons for the review of the committee's decision. The court noted that the principle of natural justice escalates with increasing strength. They constitute the forthright values of those fundamental principles of fairness which underlie and ought to underlie every civilised system of law.[19]

Friedman J held as follows:

> It is a fundamental principle in the interest of the administration of justice, particular where a Declaration of Human Rights exists, that a person appearing before a statutory quasi-judicial or disciplinary tribunal be accorded every opportunity of putting his/her case clearly and concisely. Inherent in this principle is that the said person is entitled to engage someone trained in the law to put his/her case to the tribunal concerned, in that the person trained in the law is better able to put the case than the person involved. This is the basis of legal representation.
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> A tribunal should not lightly refuse a person the right to obtain legal representation, and should postpone the proceedings in order to enable such a person to obtain legal representation when the person concerned is without legal representation, for example because of illness or death, and without any fault attaching to the person concerned. Even more so does this apply where a person has had legal representation, and the legal representative is compelled to withdraw because of illness.

The submissions made by the applicant in *Hamata* was that in view of the charges and the first appellant's intended reliance in his defence upon constitutionally entrenched freedoms, fairness required that he be allowed a legal representative of his choice and the internal disciplinary committee was vested with a discretion to allow such representation. The committee then held the view that the rules prohibited it from exercising any such discretion. The court held that the Bill of Rights in section 35 of the *Constitution* provides for a right to choose, and be represented by a legal practitioner, it does so only in the context of an arrest for allegedly committing an offence and the right to a fair trial which every accused person has. Section 33 does not make any comparative recognition or bestowal of such right. If the intention was to recognise and or bestow it would have been done expressly as in section 35.

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19 *Yates v University of Bophuthatswana* 1994 3 SA 815 (BGD) at 834.

The court found that pre-Constitutional era governed by the common law also requires proceedings of disciplinary nature to be procedurally fair whether or not an organ of the state is involved. If achieving such fairness in a particular case legal representative may be necessary, it must then be perceived that the disciplinary body must have intended to have the power to allow it in the exercise of its discretion unless it has plainly and unambiguously been deprived of any such discretion.[20] Marais JA concluded that there has always been a marked and understandable reluctance on the part of both legislators and courts to embrace the proposition that the right to legal representation of one's choice is always a *sine qua non* of procedurally fair administrative proceedings. It was further stated that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding. The court arrived at a conclusion that does not openly allow legal representation in administrative proceedings but rather made legal representation flexible, even then, in the event of cases where it is truly required in order to attain procedural fairness. The court held that while the purpose of the representation rule had been to exclude representation as of right by outsiders, given that the law required flexibility the issue was not the absence of any express provision in the rules conferring a discretion, but whether there was sufficient indication in the rules of an intention to exclude a residual discretion to allow representation by a legal practitioner who was neither a student nor a member of staff.[21] The court held further that permission to allow representation was not necessarily a right. Any such request for legal representation would have to be considered taking into account factors such as the nature of the charges brought; the degree of factual or legal complexity attendant upon considering them; potential seriousness of the consequences of an adverse finding; the availability of suitably qualified legal representatives among the technikon's student or staff body; the fact that the case against the student would be presented by a trained judicial officer; and any other factor relevant to the fairness or otherwise of confining the student to the kind of representation expressly

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20 The same approach was held in *Dladla v Administrator, Natal* 1995 3 SA 776 (N) at 775J-776B.

21 *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 449 (SCA) at par 19 460E/F-H/I.

allowed for in the representation rule. The point of departure when interpreting the technikon's rules in this case remained the same whether the procedural fairness of the proceedings of the technikon's internal disciplinary bodies were regulated by the Constitution or by the common law as subsumed under the Constitution. That point of departure, being assumed existence of discretion to allow outside legal representation, would be consistent with the values embodied in the Constitution.

3 Constitutionality of Rule 25

3.1 Introducing the problem

Initially attendance of the parties in conciliation meetings was regulated by the *Labour Relations Act* 66 of 1995,[22] but this is now regulated by rules of the CCMA or bargaining councils.

This rule makes it clear that in conciliation proceedings there is not even the option that parties can agree to allow legal representation or that the commissioner can allow legal representation during this phase. The position is different in arbitration proceedings in that legal representation is allowed only in cases which do not concern fairness of dismissals for misconduct or incapacity. Even though this is the position, it does not automatically follow that legal representation cannot be entertained in the latter cases. Sections 25(1)(c)(1) and (2) of the rule makes it clear that the parties may consent to such representation but such consent does not bind the Commissioner and the decision to allow legal representation is in the discretion of the Commissioner. Such discretion must, however, be exercised in a judicial manner.

One or both parties use some form of representation in roughly 40 percent of arbitration proceedings. Employers and employees have legal representation in only 15 per cent of dismissal arbitrations, while employees are represented by union officials in roughly 34 per cent of such cases and employers are represented

22 See repealed s 140 of LRA.

by in-house human resources personnel in 35 per cent and by officials from employer organisations in 20 per cent.[23]

3.2 The history of legal representation in CCMA

After the creation of LRA which was established by a committee consisting of lawyers of powerful trade unions lawyers and those representing the country's major employers, legal and institutional basis of collective labour law and unfair dismissal law was restructured.[24]

Legal representation at CCMA was firstly regulated by section 140 of LRA which was then repealed. Legal representation is not allowed in dismissal arbitrations unless the parties consent to it or the arbitrator permits it due to the nature of the questions of law raised by the dispute, its complexity, public interest and comparative ability of the opposing parties to deal with the arbitration.[25] The prohibition is not absolute hence the LRA affords the Commissioner discretion to allow legal representation and provides factors relevant to the decision.[26]

Legal representation was regulated by sections 135(4), 138(4) and 140(1)[27] of the *Labour Relations Act.*[28] Section 138 provided that during arbitration proceedings, a party to the dispute may appear in person or be represented by only a legal practitioner, a co-employee or by a member, office bearer or official of the party's trade union or employers' organisation and if the party is a juristic person by a director or an employee.

Section 140(1) provides as follows:

> (1) If the dispute being arbitrated is about fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138(4),

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23 Benjamin "Assessing South Africa's CCMA" 23.
24 Benjamin ''Assessing South Africa's CCMA'' 4.
25 Rule 25(1)(c) of CCMA Rules.
26 Rule 25(1)(c) of CCMA Rules.
27 These sections were repealed by *Labour Relations Amendment Act* 12 of 2002.
28 66 of 1995.

are not entitled to be represented by legal practitioner in the arbitration proceedings, unless-

(a) The commissioner and all the other parties consent; or

(b) The commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-

(i) The nature of the question of law raised by the dispute

(ii) The complexity of the dispute

(iii) The public interest and

(iv) The comparative ability of the opposing parties or their representative to deal with the arbitration of the dispute.

The Labour Appeal Court and the Constitutional Court have rejected challenge to Constitutionality of the restriction on legal representation.[29] Restriction on legal representation remains a highly contested issue, hence an application by the Law Society has resulted in 2012 ruling that the current rule violates the Constitutional guarantee of fair administrative action.[30] In *Netherburn Engineering CC t/a Netherburn Ceramics v Modau*,[31] the court heard an appeal against judgement of the Labour court that the commissioner had not misdirected himself in refusing applicant legal representation in an arbitration of a dismissal case based on misconduct. The application was based on the objection to legal representation in terms of repealed section 138(4) and section 140(1) of LRA and ultimately replaced by sub-rules 25(1)(b) and (c). The court held in this case that the admitted seriousness of arbitrations concerning dismissals for misconduct did not of itself justify legal representation.[32] The court held further that the distinction between the absolute right of legal representation in CCMA arbitrations other than dismissals for misconduct or incapacity and discretionary right afforded where the fairness of such dismissal was in issue to be justified.[33] The court continued to mention that the commissioner could regularly determine before the arbitration started whether legal representation was appropriate. The court disagreed with

29 Benjamin ''Assessing South Africa's CCMA'' 23.
30 *Law Society of the Northern Province v Minister of Labour* Case No 61197/11 HC.
31 *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2009 4 BLLR 299 (LAC).
32 *Netherrnburn Engineering CC t/a Nethernburn Ceramics v Mudau* 2009 30 ILJ 269 (LAC) at par 29.
33 *Nethernburn Engineering CC t/a Nethernburn Ceramics v Mudaui* 2009 30 ILJ 269 (LAC) par 37.

this analogy and commented that it frequently happens that a less complicated matter may end up being complex. It was also held on conclusion that it was rational to make the distinction because dismissals based on misconduct and incapacity constitutes by far the bulk of the disputes arbitrated by the CCMA.[34] The judge basically disagreed with the argument that section 138(4) provides for an automatic right to legal representation and that section 140(1) is merely an exception to it that limits that right to legal representation.

The judge remarked as follows:

> The matter can best be approached by first determining what the purpose impugned provisions is meant to serve. In this regard, the court a quo referred to Explanatory Memorandum on the labour relations bill as published in 1995 16 ILJ 278. The Memorandum takes into account the experience drawn from the application of the 1956 LRA and points out that under the latter act resolution of labour disputes had, contrary to earlier intentions, become legalistic in form with the result that the process had become expensive, inaccessible, protracted and adversarial. The Memorandum attributes this to the involvement of lawyers and recommends that the best way of correcting the situation is to exclude them from the process.

Much of the reasoning of Musi J in *Netherburn Engineering CC t/a v Mudau* is founded on the fact that section 141(1) of LRA, the measure which the learned judge was examining, was national legislation.[35] The effect of this was that the provisions of section 3(3) of PAJA were not required in that context to be observed. He found that this demonstrate the difference between the two cases.[36]

4 The effect of the Constitution on the right to legal representation

Due to the fact that South Africa is a Constitutional democracy governed by the Constitution which serves as guardian of among others labour right, it pivotal that focus is given to the development of rights to legal representation throughout the years. There are different views with regard to interpretation of a right to legal

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34 *Nethernburn Engineering CC t/a Nethernburn Ceramics v Mudau* 2009 30 ILJ 269 (LAC) par 41 of judgment of Musi J.

35 *CCMA v Law Society, Northern Provinces* (005/13) [2013] ZASCA 118.

36 Par 37 of Tuchten J judgment in *CCMA v Law Society of Northern Provinces* (005/13) ZASCA [2013] 118.

representation at CCMA. There are those who believe that it is fair to allow legal representation at CCMA, while others are of the view that it should be allowed but subjected to certain limitation. Discussion here focuses on Constitutional right which relates to a right to legal representation at CCMA.

Section 9(1) of the Constitution provides that everyone is equal before the law and has a right to equal protection and benefit of the law. Section 9(3) takes further by providing that, the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture language and birth. This section was interpreted in a case of *Harksen v Lane*,[37] where the court analysed stages of enquiry into violation of the equality clause as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? The court held that this required a two-stage analysis:

    (i) Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

    (ii) If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. The court also commented that if at the end of this stage of enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) and (4).

37 *Harksen v Lane* 1998 1 SA 300 (CC) 53.

(c) If the discrimination is found to be unfair then the determination will have to be made as to whether the provision can be justified under the limitation clause.

One needs to establish against this discussion whether rule 25 unfairly discriminates against legal practitioners or not. This is so because the rule allows directors of companies, and other legal persons, members of close corporations and trade unions official to appear in any arbitration whereas legal practitioners may only do so in dismissal cases for misconduct or incapacity only at the discretion of the commissioner. The court in *Prinsloo v Van der Linden*[38] held that, with regard to mere differentiation the Constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and fundamental premises of a Constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.

The other constitutionally entrenched right which relates to rule 25 is the right to freedom of trade, occupation and profession.[39]

Section 33(1) of the *Constitution of South Africa* 1996 (herein after referred to as the *Constitution*) provides for a right to an administrative action that is lawful, reasonable and procedurally fair. Section 33(2) of the *Constitution* further provides for written reasons to be given to everyone whose rights have been negatively affected by an administrative action. In *President of the Republic of South Africa v South African Rugby Football Union*[40] it was held that, the main aim of section 33 is to regulate conduct of the public administration and, in particular, to ensure that in cases where action taken by an administration affects or threatens individuals, all processes followed must comply with Constitutional standards of administrative justice. The court held further that the *Constitution*

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38 *Prinsloo v Van der Linden* 1997 3 SA 1012 (CC).

39 S 22 of the *Constitution of the Republic of South Africa*, 1996 allows every citizen the right to choose their Trade, occupation or profession freely. The practice of trade, occupation or profession may be regulated by Law.

6 *President of the Republic of South Africa v South African Rugby Football Union* 1999 10 BCLR 1059 (CC).

was committed establishing and maintaining an efficient, equitable and ethical public administration which has respect for fundamental rights and is accountable to the broader public.

4.1 Limitation of rights to legal representation

When dealing with rights, guidance can be sought from constitutionally protected rights. The question that then needs to be answered in this regard is to what extent rights pertain to legal representation maybe limited. Every right in the bill of rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[41]

Legal representation is clearly not an absolute right and this has been the case even before the Constitution era.[42] In *Dabner v SA Railway & Harbour*,[43] the issue was whether Dabner, an employee of the railway administration, against whom a charge of misconduct had been laid, was entitled to legal representation at an internal statutory inquiry that followed. The Appellate Division held that such representation could not be allowed. The court held as follows:

> Now clearly the statutory board with which we are concerned is not a judicial tribunal.
>
> Authorities and arguments, therefore, with regard to legal representation before courts of law are besides the mark, and there is no need to discuss them. For this is not a court of law, nor is this enquiry a judicial enquiry. True, the board must hear witnesses and record evidence, but it cannot compel them to attend, nor can it force them to be sworn; and, most important of all, it has no power to make any order. It reports its finding, with evidence, to an outside official, and he considers both and gives his decision. Nor can it properly be said that there are two parties to the proceedings. The charge is formulated by an officer who is no party to the enquiry. The board is a domestic tribunal constituted by statute to investigate a matter affecting the relations of employer and employee. And

41 S 36 of the Constitution, which also provides that consideration must be given to the nature of the right; the importance of the purpose of the limitation; the relation between the limitation and its purpose and less restrictive means to achieve the purpose. See also *Zondi v MEC Traditional and Local Government Affairs* 2005 3 SA 589 (CC) 617 par 81.

42 *Dabner v SA Railways and Harbours* 1920 AD 583, the court had to decide whether to allow legal representation at an administrative tribunal.

43 1920 AD 583.

> the fact that the enquiry may be concerned with misconduct so serious as to involve criminal consequences cannot change its character.[44]

In *Cuppan v Cape Display Chain Services*,[45] after the appellant was charged for having for unauthorised removal of certain company property, he argued that he was not in a position to conduct disciplinary proceedings himself as he lacked skills to do so. The court the held as follows:

> It appears to be settled law that where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation; and where the relationship is governed by a contract, the right of the person being subjected to an inquiry must depend on the contract itself.

There is no absolute right to legal representation in our law, although where the employee is faced with a serious charge which may warrant a sanction of dismissal, it may be in his or her best interest that he or she be allowed legal representation.[46] Our legal system has not reached a stage whereby the right to legal representation may be regarded as a fundamental right required by the demands of natural justice and equity.[47]

While some have regarded the limitation on the right to legal representation as doubtful Constitutional validity, the Labour, Labour Appeal and Constitutional Courts have held that this restriction does not infringe the Constitution because commissioners retain discretion to allow legal representation,[48] which discretion must be exercised judicially.[49]

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44 *Dabner v SA Railway & Harbour* at 597-8.
45 *Cuppan v Cape Display Chain Services* 1995 16 ILJ 846 (D).
46 *Lace v Diack* 1992 13 ILJ at 865.
47 *Lace v Diack* 1992 13 ILJ at 865.
48 Grogan *Labour Litigation and Dispute Resolution* 136; see also *Norman Tsie Taxis v Pooe* 2005 26 ILJ 109 (CC); *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2003 24 ILJ 1712 (LC), confirmed on appeal 2009 30 ILJ 269 (LAC) and finally, the Constitutional Court 2009 30 ILJ 1521 (CC).
49 Grogan *Labour Litigation and Dispute Resolution* 136.

5 Statutory and Constitutional framework relevant to rule 25

The CCMA was established in terms of section 112 of LRA and it is said to be an independent body with jurisdiction throughout the Republic.[50] The commissioners must be qualified and have wide powers to resolve disputes.[51]

In *Engen Petroleum Ltd v CCMA,*[52] the court held that it is right and proper that as many disputes as possible that are not amicably resolved at the work place, should be referred to the CCMA or bargaining councils and other mutually agreed forums for conciliation and, later, arbitration, irrespective of what any one may think of the merits or demerits of such disputes. The court mentioned further that the existence of CCMA assists in channelling, among others, workers grievances to where they can be ventilated without any interruption and disruption of production. It was also held that unions should be encouraged to refer dismissal disputes with employers to the CCMA for arbitration if they are aggrieved by such dismissals.

5.1 PAJA and LRA

Before rules of the bargaining councils and CCMA could operate, the issue of legal representation was regulated by LRA. The LRA as already briefly discussed clearly states that parties may only appear in person, or be represented only by director or employee of that party or, in case of a close corporation, a member, and by any member, office bearer or official of that party's registered trade union or registered employers' organisation. Section 115(2A) of LRA allows CCMA to make rules regulating the practice and procedures in connection with the resolution of a dispute through conciliation or arbitration and also regulate the process by which conciliation is initiated, and the form, content and use of that process. Section 115(2A) of LRA also empowers the CCMA to regulate in its rules, the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings.

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50 Ss 113 and 114 LRA.
51 Ss 117 and 142 LRA.
52 *Engen Petroleum Ltd v CCMA* 2007 8 BLLR 707 (LAC).

In terms of the PAJA, persons performing administrative functions must consider on case by case basis whether affected persons should be accorded a right to legal representation.[53] Considering this provision one would come to a conclusion that PAJA is inconsistent with provisions of LRA on this aspect.

However, the present position with regard to rule 25 is supported by certain statutory provisions as well as Constitutional provisions. The question which has to be considered is whether PAJA or LRA correlate with the provisions of this rule.

The Court of in *Minister of Health v New Clicks South Africa*[54] and *Bato Star Fishing v Minister of Environmental Affairs*,[55] dealt with the provisions of both legislation which gives effect to the Constitutional right to just administrative action.

Section 138(1) of the LRA, provides that a commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities. Section 138(2) also makes a provision that subject to the commissioner's discretion, a party to the dispute may give evidence, call witnesses, cross-examine the other party's witnesses and address concluding argument to the commissioner. In doing so, the commissioner must also take cognisance of provisions of any code of good practice issued by NEDLAC, which has been established in terms of *National Economic Development and Labour Council Act*.[56] Section 138(7) of the LRA provides that a commissioner must issue an arbitration award with brief reasons. A copy will, therefore, be served on each party to the dispute or their representative and the original will be filed with the registrar of the Labour Court. Section 144 of LRA provides that, any commissioner who has issued an arbitration award or ruling or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling which was erroneously sought or erroneously

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53 S 3(3).
54 *Minister of Health v New Clicks South Africa* 2006 2 SA 311 (CC).
55 *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC).
56 35 of 1994.

made in the absence of any party affected by that award; in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission. Legal representation is, however, allowed in such applications. Due to the fact that an arbitration award is final and binding it may in terms of section 145 of the LRA be subjected to review by the Labour court. No appeal is applicable in terms of arbitration award.

With the above discussion in mind the court in *New Clicks and Bato Star,* did not examine the nature of the commissioner's function with reference to section 33 of the Constitution, nor did it consider whether PAJA provided an exclusive statutory basis for the review of all administrative decision. Section 1 of PAJA defines an administrative action as any decision taken or failure to make a decision by an organ of the state, when exercising a power in terms of the Constitution or provincial Constitution, or exercising a public power or performing public function in terms of any legislation; or a natural person or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has direct, external legal effect. The appellate division in an old case of *South African Technical Officials' Association v President of the Industrial Court*[57] remarked that an administrative body, although operating as such, may nevertheless in the discharge of its duties function as if it were a court of law performing what may be described as judicial functions, without negating its identity as an administrative body and becoming a court of law. The meaning thereof is that parties would not under common law be entitled to legal representation as of right.[58] However, the common position law has been amended by the LRA with the effect that parties to proceedings before Industrial Court are now entitled to legal representation as of right, provided no other party objects thereto.[59]

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57 *South African Technical Officials' Association v President of the Industrial Court* 1985 1 SA 597 (A).
58 Buirski 1995 *ILJ* 529.
59 *Morali v President of the Industrial Court* 1986 4 ILJ 690 (IC) at 133G.

Although as per discussion there are many similarities between CCMA arbitrations and court of law proceedings, CCMA is being described as not having a status of a court of law and so it does not have judicial authority within the contemplation of the Constitution. It said to be an administrative tribunal in the same way as the industrial court was and, being an organ of the state under section 239 of the Constitution, is directly bound by the bill of rights. It is also subject to the basic values and principles governing public administration.[60]

The CCMA is not a branch of the judicial and does not exercise judicial power. Rather, the exercise of the compulsory arbitration power is an exercise of public power of an administrative nature. The arbitration power is designed to fulfil the primary goal of the Act which is to promote labour peace by the effective settlement of disputes. It does so with an element of compulsion, corresponding to the traditional government.[61] Generally accepted, constitutional view is that public power at every level is only legitimate when lawful. This clearly means that a principle of legality is a requirement and this principle requires that conduct in the exercise of public power must not be arbitrary or irrational.[62] The rules of CCMA through its framing is an example of an administrative decision, must be rational.[63] Reasons must always be given for every administrative decision so as to allow the affected party an opportunity to rebut the defence by the decision-maker. Exemption from giving reasons will almost invariably result in immunity from an irrational challenge.[64]

The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law.[65]

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60 Brassey *Employment and Labour Law* A7-1 – A7-2.
61 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 651.
62 *Judicial Service Commission v Cape Bar Council* 2012 ZASCA 115 at 21.
63 *Minister of Health v New Clicks South Africa* 2006 2 SA 311 (CC) at 135.
64 *Judicial Service Commission V Cape Bar Council* 2012 ZASCA 115 at 44.
65 *Bell Porto School Governing Body v Premier, Western Cape* 2002 ZACC 2; 2002 3 SA 265 (CC) at 159.

A duty to give reasons entails a duty to rationalise the decision. Reasons, therefore, help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair but also conductive to public confidence in the administrative decision-making process. Thirdly, a major reason for the reluctance to give reasons may only be due to the fact that reasons are not known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for purpose of future applications.[66]

When one considers the provisions of section 33(3) read with item 23(2) of Schedule 6 to the Constitution, it is contemplated that the national legislation referred to in section 33 of the Constitution is to be enacted and the results was PAJA. Section 33 of the Constitution does not make any provisions for exclusion specialised legislative regulation of administrative action in the LRA alongside general legislation such as PAJA. The court in the *Bato Star case* remarked that the provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. The authority of PAJA to ground such causes of action rests squarely on the Constitution. PAJA gives effect to section 33 of the Constitution, matters relating to interpretation and application of PAJA will be a Constitutional matter.[67] In *New Clicks*, the court commented that PAJA is the national legislation that was passed to give effect to the substance is a codification of these. It was required to cover the field and purports to do so.[68] PAJA makes it clear that in section 3(3) that, a person whose rights are materially and adversely

66 Baxter *Administrative Law* 228.
67 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) at par 25.
68 *Minister of Health v New Clicks South Africa* 2006 2 SA 311 (CC) at par 95.

affected by an administrative action must be given an opportunity to obtain legal representation in both complex serious matters.

The court in assessing the provisions of repealed section 140(1) of LRA said in *Ndlovu v Mullins,*[69] that the subsection upon which the commissioner purports to rely requires the commissioner and each of the parties to consent to legal representation on behalf of one or more parties to the arbitration proceedings. It is not sufficient for the parties to consent. The court held further that even if both parties by their conduct indicated unequivocally that they consented to legal representation on behalf of one or both of them it remains incumbent on the commissioner hearing the matter to independently exercise discretion as to whether or not his or her consent should in the circumstances be given. The learned judge in *Colyer v Essack; Malan v CCMA & Another*[70] said section 140(1)(a) of LRA does not give a commissioner the right to act on a mere whim when consenting to legal representation. Such consent, which entitles a party to be represented by a legal representative, is discretion to be exercised by the commissioner who is duty bound to do so judicially. Secondly section 140(1)(a) of the Act is clearly not intended to deal with the position where the commissioner exercises his or her discretion at the request of a party. It actually meant to deal with the position where all parties before the arbitration want legal representation and the commissioner is then placed in a position to decide whether to allow legal representation or not. Refusal by the commissioner to allow legal representation is a judicial discretion which must be properly exercised, taking into account, the facts as listed in section 140(1)(b)(i)-(iv) of the Act. There is no certainty as to whether the remarks of the learned judge should be understood to mean that section 140(1)(a) is confined to the situation where every party before the commissioner wants legal representation as opposed to all parties consenting to one or more of the parties being represented by a legal practitioner. The view seems to be that the section also provides for the situation where one out of a number of parties is represented by a legal practitioner whilst others are not, but the parties so not represented by legal practitioner have consented to the former

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69 1999 20 ILJ 177 (LC).
70 1997 18 ILJ (LC) at 1384B-F; 1997 9 BLLR 1173 (LC) at 1176F-H.

being represented in that fashion.[71] Van Dokkum in his journal continues to say that from the judgement of Basson J in the latter case, the commissioner is required consciously to apply her mind to the question whether or not her consent is to be given to the parties being represented by legal practitioners.[72]

It is a very short-sighted approach which regards legal practitioners as only being capable of adversarial litigation and taking umpteen points in limine. Happily, this is not often the case, given the new emphasis on dispute resolution in legal curricula.[73] This view emphasise the fact that lawyers in particular are trained to make sure that litigation as well as administrative proceedings are not characterised by flaws and that they run smoothly so as to achieve the desired results. The process of calling witnesses, cross questioning such witness as well as delivering a sound and acceptable argument requires a certain level knowledge and training.

6 Application of Rule 25 by the CCMA and the courts pronouncement

Recent case law has so far given a different perspective or decisions with regard to whether legal representation should be allowed when a dispute is about dismissal based on misconduct or incapacity and or whether rule 25 of CCMA rule is Constitutional in this regard or not.

The position as already discussed above is that CCMA rules, generally adopted by the bargaining councils, state that parties may appear in person, or be represented only by a director or employee of that party or, in case of a close corporation, a member, and by any member, office-bearer or official of that party's registered trade union or registered employers' organisation.[74] Only registered trade unions may represent employees and employers' organisations may represent their members.[75] Officials or members of employers' organisation, which happen to be

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71 Van Dokkum 2000 *ILJ* 842.
72 Van Dokkum 2000 *ILJ* at 185.
73 Van Dokkum 2000 *ILJ* 842.
74 Grogan *Labour Litigation and Dispute Resolution* 111 and Rule 25(1)(a).
75 Grogan *Labour Litigation and Dispute Resolution* 111.

a labour consultancy, were not entitled to represent another member.[76] The barring of legal representatives in terms of rule 25 from conciliation meetings applies only to their physical presence. Nothing prevents the parties from consulting lawyers before or during the conciliation process, provided they are not physically present.[77]

6.1 Allowing legal representation during unfair dismissal disputes

Consent by both parties may lead to legal representation being allowed, although commissioners must still apply their minds independently to such applications, and exercise their discretion judicially. Where one party does not agree to legal representation, the commissioner must rule on the matter.[78]

Legal representation may only be allowed if the commissioner is of the view that it would be unreasonable to expect a party to deal with the dispute without legal representation, given the nature of the questions of law raised by the dispute, its complexity, the public interest, and the comparative ability of the opposing parties or their representatives to deal with the dispute.[79] Other consideration may also be taken into account like in situations where a person capable of representing an employer was also a key witness in the dispute, legal representation should in all fairness be allowed.[80]

In a case of *Secunda Supermarket CC t/a Secunda Spar & Another v Dreyer*,[81] the facts in short are that the first applicant was a member of a union called Allied Small and Medium Business Employers Organisation (herein after referred to as ASAMBO), during arbitration hearing after the employees were dismissed. Mr Louw who was an official of the union was denied the right to represent the applicant at arbitration hearing. Reasons cited by the commissioner were that the said union's registration process has not been finalised. Mr Louw was not even

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76 Grogan *Labour Litigation and Dispute Resolution* 111.
77 Grogan *Labour Litigation and Dispute Resolution* 112.
78 Grogan *Labour Litigation and Dispute Resolution* 135.
79 Rule 25(2); see also Grogan *Labour Litigation and Dispute Resolution* 135.
80 Grogan *Labour Litigation and Dispute resolution* 135.
81 *Secunda Supermarket CC t/a Secunda Spar v Dreyer* 1998 19 ILJ 1584 (LC).

given platform to present arguments. An attorney was subsequently appointed to represent the applicants. Before hearing could resume, the commissioner made a comment that she was not going to allow any third party to represent the first applicant.

With regard to the issue of legal representative when the matter was ultimately taken to the Labour Court, the court referred to provisions of section 140(1) of LRA.[82] The court mentioned that the commissioner had to consider provisions of section 140(1)(b)(i)-(iv) when refusing legal representation.[83] The court held further that whether to refuse or allow representation is a discretionary matter in the absence of the consent by the commissioner or the parties concerned and that the court should, therefore, not intervene unless there is an irregularity.[84] The court then ruled that, the section is clear that the commissioner has to satisfy himself or herself that provisions of the section are properly observed. However, the commissioner must do so judicially and not act on a mere whim.

The issue in this case now is that the commissioner insinuated that she will not allow any third party to represent the first applicant, even prior to hearing the application by the attorney for the right to represent the first applicant. The court found that this was clearly irregular as she had pre-judged the issue before hearing the application.[85]

In *Commuter Handling Services v Mokoena*,[86] the employer had objected to legal representation for the employee. The commissioner allowed the employee to be legally represented on grounds that the issues were complex and that it would be

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82 S 140(1) of LRA provided that 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, the parties, despite s 138(4), are not entitled to be legal practitioner in the arbitration proceedings unless the commissioner and all the other parties consent; or the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representative, after considering, the nature of the questions of law raised by dispute; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties or their representative to deal with the arbitration of the dispute.

83 *Secunda Supermarket CC t/a Secunda Spar v Dreyer* 1998 19 ILJ 1584 (LC) par 24.

84 *Secunda Supermarket CC t/a Secunda Spar v Dreyer* 1998 19 ILJ 1584 (LC) par 24.

85 *Secunda Supermarket CC t/a Secunda Spar v Dreyer* 1998 19 ILJ 1584 (LC) par 25.

86 *Commuter Handling Services (Pty) Ltd v Mokoena* 2002 23 ILJ 1400 (LC).

unjust to allow the employee, who was a bus driver, to conduct the proceedings against the employer's human resources manager. When the employer requested a postponement to arrange legal representative the commissioner refused, citing reasons that the employer should have known that the employee was likely to be represented. The commissioner ultimately allowed the human resource manager to bring legal representative after the manager struggled throughout the first day of the hearing. The court then found that the commissioner had consented to legal representation because the matter was complex. The court further found that it was quite unfair for the human resource manager not to be given an opportunity to obtain services of legal representative on the first day of the hearing. It was found that the commissioner's decision vitiated the entire proceedings.[87]

6.2 Opposition to legal representation

In a case of *Samson v Commission for Conciliation, Mediation and Arbitration*,[88] at the commencement of the arbitration hearing after an employee was dismissed, the commissioner first had to deal with an application by the company to be represented by a legal practitioner. The applicant opposed the application. After hearing the parties' respective submissions, the commissioner ruled in favour of the company. On review the applicant attacked the arbitration award on a number of grounds, among others, the ruling made by the commissioner on legal representation. The court dealt with the issue of legal representation on the basis that the employee relied on the repealed section 140(1) of the LRA. The court found that it is not understandable that the applicant made a claim that breach of that subsection might form the basis of a reviewable irregularity.[89] The court then held that the applicable rule in this instance is rule 25 of the Rules for the Conduct of proceedings before CCMA.[90] The court on this basis found that the commissioner weighed up all the relevant factors and in particular the disadvantage to which the applicant may be put by allowing the company legal

87 Grogan *Labour Litigation and Dispute Resolution* 137-138.
88 *Samson v CCMA* 2010 31 ILJ (LC).
89 *Samson v CCMA* 2010 31 ILJ (LC) par 8 of judgment,
90 In terms of the rule, the commissioner was required *inter alia* to take into account the nature of the question of law raised by the dispute, the complexity of the dispute and the comparative ability of the parties or their representative to deal with the dispute.

representation. The court also considered that the commissioner's decision is in line with the fact that a legally trained person might bring clarity to what promised to be a debate on a number of legal technical issues.[91]

Consideration was also given to the fact that the applicant made insinuations that he conducted research and prepared himself to argue that legal points that would arise in the course of the proceedings. The applicant did not at the time of the proceedings make any indication that he would like to secure a legal representative for himself.

The court went further to mention that there is no reason why anyone could come to a conclusion that the decision made by the commissioner was not reasonable. The court ruled that the commissioner had a right to exercise a judicial discretion and that indeed such duty was properly disposed of. The court even mentioned that the commissioner's conduct fell outside of the band of reasonableness established by *Sidumo* case.[92]

6.3 Legal representative as an observer

In *Pelleteir v B & Quarries (Pty) Ltd v CCMA*,[93] the employer raised an objection that the commissioner acted improperly in failing to exclude the applicant's attorney from the arbitration proceedings. During the hearing an objection was raised by the employer's representative that legal representation should not be allowed. The attorney then argued that the matter was of such a serious nature that his client should be afforded legal representation of his choice under section 140(1)(b). The commissioner refused these assertions by the attorney but, however, had the following to say:

> I, however, have no objection to his representative, Mr van Rensburg, sitting in on the matter and if there is any questions that you (referring to

91 *Samson v CCMA* 2010 31 ILJ (LC) par 8.
92 *Sidumo v Rustenburg Platinum Mines* 2008 2 SA 24 (CC).
93 *Pilleteir v B & E Quarries v CCMA* 2000 21 ILJ 624 (LC).

> applicant) wish to raise with him will give you the opportunity to go out and speak with him on the matter.[94]

The attorney remained next to his client and even made comments which were recorded during the proceedings. The employer argued that the commissioner had a discretion whether or not to allow legal representation, but submitted once this discretion was exercised in disallowing legal representation, the commissioner did not have any discretion to allow the attorney to say anything at all. The court held as follows in this regard:

> In my view, the approach suggested by Mr van Zyl is unduly formalistic. By allowing that attorney to remain in the room and on a few occasions to make a few remarks, the commissioner did not act in my view improperly or irregularly in the sense that this could constitute a ground to justify reviewing and setting aside the proceedings. It does not appear that any injustice to the employer resulted from what occurred in this regard. Accordingly, in my view, this ground of review has no merit.[95]

The commissioner in a case of *SA Post Office v Govender*[96] ruled against the first respondent after he applied to be legally represented at the arbitration. However, he ruled that the attorney could remain in the proceedings but was precluded from representing the first respondent, who was permitted to consult with the attorney from time to time. The attorney was allowed to assist the first respondent by writing him notes on how to conduct his case, the question to the witnesses and the representations to be made.[97] The court then in deciding whether there was irregularity, held that the commissioner purposefully took into account the criteria enumerated in section 140 of the LRA, and found that there was insufficient public interest to warrant legal representation.

The court finally concluded that the commissioner undermined his ruling by allowing the attorney to participate in the process by writing notes to the first respondent to assist him in the conduct of the case. The irregularity was escalated by the fact that the commissioner even allowed the first respondent to

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94 *Pilleteir v B & E Quarries v CCMA* 2000 21 ILJ 624 (LC) par 10.
95 *Pilleteir v B & E Quarries v CCMA* 2000 21 ILJ 624 (LC) par 12.
96 *SA Post Office v Govender* 2003 24 ILJ 1733 (LC).
97 *SA Post Office v Govender* 2003 24 ILJ 1733 (LC) par 9.

submit argument which was prepared by his attorney. This was said to have disturbed the balance between the comparative abilities of the parties.[98]

6.4 Withdrawal of permission for legal representation

This aspect was dealt with in a case of *Colyer v Essack*,[99] where the application was brought by the employee, Colyer, to review an award granted by the commissioner who arbitrated her dispute with her employer. The commissioner had in terms of section 140(1) of the LRA allowed her legal representation.[100] On resumption of the arbitration and on discovery that the employee's attorney was only a candidate attorney, the commissioner withdrew Colyer's right to legal representation, but refused her request for postponement to enable her to find other legal representation. The commissioner held a view that she had consented to legal representation in terms of section 140(1)(a) of LRA, which requires the consent of the commissioner and all other parties, and that she could, therefore, validly withdraw her consent on learning that the attorney was not fully qualified.

The Labour Court held a different view in that the said section 140(1)(a) did not give the commissioner a right to act on a mere whim, and was intended to deal with the position where all parties wanted legal representation and the commissioner was then placed in a position to refuse to allow representation by withholding his or her consent. The court held further that once the commissioner has allowed legal representation, the party then obtained a right to legal representation and by withdrawing the right the commissioner must exercise a judicial discretion and consider provisions of section 140(1)(b) to (iv).

The court then found that in fact the commissioner did not exercise judicial discretion and that the commissioner committed a gross irregularity by not postponing the matter to allow Colyer to find other legal representation.[101]

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98 *Colyer v Essack* 1997 18 ILJ 1381 (LC) 16.
99 1997 18 ILJ 1381 (LC).
100 *Colyer v Essack* 1997 18 ILJ 1381 (LC) 18.
101 *Colyer v Essack* 1997 18 ILJ 1381 (LC) 19.

6.5 Refusal of legal representation

In *Afrox Ltd v Laka*[102] the respondent employees were reinstated by the first respondent, a CCMA commissioner, after he had found that their dismissal by the applicant was unfair. The applicant contended that the award should be set aside on the grounds that the first respondent had improperly refused it legal representation, that the first respondent had given the applicant's representatives the impression that he lacked impartiality, and that the first respondent had not permitted the applicant to lead material evidence.[103] The court then noted that, while a right to legal representation generally applied in CCMA proceedings, an exception had been created in the case of dismissals for misconduct and incapacity. In those cases, legal representation was only permitted if all parties and the commissioner consented or if one of the parties objected, the commissioner had decided that legal representation should be permitted on one of the grounds specified in the Act.[104] The court also noted that for a party to acquire legal representation it is important for the commissioner to have concluded that it would be unreasonable to expect the party to deal with the matter without legal representation.[105]

The court found that before the commissioner decided the issue of legal representation, he considered the provision of section 140(1) of LRA and he invited argument and he considered those matters and then decided that the applicant would not be permitted to be represented by a legal practitioner. On the basis of this finding the court then held that there was no basis for setting aside the commissioner's ruling on legal representation or the award on the basis advanced.[106]

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102 *Afrox Ltd v Laka* 1999 5 BLLR 467 (LC).
103 *Afrox Ltd v Laka* 1999 5 BLLR 467 (LC) 467.
104 S 140(1)(b)(i) to (iv) before it was repealed and replaced by Rule 25.
105 *Afrox Ltd v Laka* 1999 5 BLLR 472.
106 *Afrox Ltd v Laka* 1999 5 BLLR 467 (LC) 477.

In *Strydom v CCMA & Others*[107] the respondent was dismissed after an alleged misconduct, the matter was referred to CCMA for conciliation and later arbitration. Before the hearing the applicant sought leave to be represented by a legal practitioner and the application was refused by the commissioner.[108] Contention by the applicant was that the decision of the commissioner should be set aside on the basis that the commissioner failed to evaluate the complexity of the matter properly and that he had further misdirected himself by assuming, without supporting evidence that legal representation would prolong the process. The court in deciding the case considered the judgement in *Afrox Ltd v Laka*. It was held that to properly analyse the merits of review application, one would have preferred a fuller set of reasons in which all of the issues considered were identified, discussed and elaborated to decisive conclusions. The incompleteness of the reasons given cannot of itself or on that ground alone lead to setting aside of the ruling.[109] The court noted that when considering application for legal representation the commissioner is required to act judicially. The court found that an application to allow legal representation in terms of section 140(1) must be approached from the premise that a party is not entitled to such representation. There is no absolute right to representation, but the commissioner does have a discretion which must be exercised judicially.[110] While past experiences are replete with instances demonstrating the advantages brought to a case by lawyers, there are many commentators who see legal representation as frequently undermining of endeavours to resolve disputes expeditiously.[111]

The court in the *Strydom* case ultimately found that the onus rests on the applicant to show that the commissioner, in reaching the conclusion that it was not unreasonable to expect the applicant to deal with the dispute without legal representation, acted irregularly, irrationally or capriciously in some way, or did not

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107 *Strydom v CCMA* 2004 10 BLLR 1032 (LC).
108 *Strydom v CCMA* 2004 10 BLLR 1032 (LC) 1033.
109 *Afrox Ltd v Laka* 1999 ILJ 1732 (LC) at 1740H-1742B.
110 *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2003 24 ILJ 1712 (LC) 1718FM.
111 Pg 1038 of the judgment; see also Benjamin 1994 *ILJ* 250.

take the factors in section 140(1) of the LRA into consideration properly. The court found that the applicant failed to discharge this onus.[112]

The Constitutional Court in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau*,[113] refrained from making a ruling on the question of Constitutionality of section 140(1) in that the applicant had a right to legal representation before statutory tribunal citing reasons that it is not in the interest of justice for the Constitutional point relating to legal representation before CCMA to be determined in this case.[114] In fact the reasoning of the court was based on the fact that in all probability, there was no live dispute which would be affected by determination of the Constitutionality of section 140(1) of LRA.

7 The approach in Law society of Northern Provinces v CCMA

In *CCMA V Law Society, Northern Provinces*,[115] the application was based on the High Court decision that rule 25(1)(c) is unconstitutional in precluding legal representation in arbitrations about misconduct or incapacity dismissals. The court suspended the declaration of invalidity for a period of 36 months to allow the CCMA to formulate a new rule.

The argument presented by the Law Society of the Northern Provinces was that the sub rule unfairly discriminated against legal practitioners in violation of section 9 (3) of the Constitution and provisions of *Prevention of Unfair Discrimination Act* 3 of 2000; that infringed section 22 of the Constitution which guarantees every citizen the right to choose their trade, occupation or profession freely; and that the exclusion of legal representation infringes provisions of section 34 of the Constitution which guarantees every person right to have one's dispute resolved in a fair public hearing before a court or another independent and impartial tribunal or forum. The Law Society submitted that CCMA proceedings are more like judicial

112 *Strydom v CCMA* 2004 10 BLLR 1032 (LC) 1038.
113 *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2010 2 SA 269 (CC).
114 *Nethernburn Engineering CC t/a Nethernburn Ceramics v Mudau* 2010 2 SA 269 (CC) par 13.
115 *CCMA v Law Society, Northern Provinces* (005/13) 2013 ZASCA 118.

proceedings and that legal representation should be allowed to ensure procedural fairness. Further submissions were that section 3(3) of *Promotion of Administrative Justice Act* 3 of 200 (herein after called PAJA) should not be considered in determining the Constitutionality of the sub-rule. This case law caused much argument within legal fraternity with regard to the question whether a new chapter in labour law with regard to CCMA rules can be written. This approach also seeks to answer a question whether the application was aimed at making sure that parties who are litigants are protected or not. Tuchten J concluded as follows:

> It is in my view a fair conclusion that the several negotiating parties who participated in the Deliberations that led to the enactment of the LRA came to compromised solution in relation to legal representation at arbitrations which found its way into the now repealed ss138(4) and 140(1) of the LRA and ultimately into sub-rules 25(1)(b) and (c). I am mindful of the subtle balances that must inevitably be present in our system of workplace dispute regulation, but of course any such balances which are translated into legislation or administrative action must pass Constitutional muster, an administrator as that term is used in PAJA has a discretion under s 3(3)(a)to give a person, whose rights are materially and adversely affected by administrative action, an opportunity to obtain legal representation both in serious and in complex cases.[116]

The Supreme Court of Appeal in case of *Commission for Conciliation, Mediation and Arbitration v Law Society of the Northern Provinces*,[117] made reference to the motivation made in the Explanatory Memorandum submitted to NEDLAC which provided as follows:[118]

> International research shows that our system of adjudication of unfair dismissal is probably one of the most lengthy and most expensive in the world. And yet it fails to deliver meaningful results and does not enjoy the confidence of its users. Not surprisingly, dismissals trigger a significant number of strikes.
>
> The draft bill explicitly regulates unfair dismissals and clearly states the permissible and Impermissible grounds for dismissal. The procedural requirements for fair dismissal are clarified as are competent remedies. A speedy, cheap and non-legalistic procedure for the adjudication of unfair dismissal cases is provided.

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116 *CCMA v Law Society of the Northern Provinces* (005/13) 2013 ZASCA 118 479.
117 *Commission for Conciliation, Mediation and Arbitration v Law Society of the Northern Provinces* 2014 2 SA (SCA).
118 Explanatory Memorandum 1995 16 *ILJ* at 285.

> Legal representation is not permitted during arbitration except with the consent of the parties. Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach they adopt, allowing legal representation places individual employees and small businesses at a disadvantage because of the costs.[119]

A full bench of judges considered the submissions made to NEDLAC where the parties agreed that in arbitration proceedings concerning fairness of dismissals for misconduct or incapacity, legal representation should be permitted only where circumstances justified it, and that it should be in the discretion of the arbitrating commissioner whether those circumstances were present.[120] The court also noted that the agreement was embodied in the now repealed section 140(1) of the LRA which was enacted in 1995. The court went further to note that the sub-rule proceeds from the premise that most of the cases involving dismissal for misconduct or incapacity is less serious, in the sense of being less complex, is regulated by a code of conduct[121] and should be adjudicated swiftly and with a minimum of legal formalities. The underlying consensus by the parties in this regard was that legal representation in these cases should not be required or permitted unless justified by the nature of the legal issues that may arise, the complexity of the matter, the public interest and the comparative ability of the parties and their representatives. It was held that this was part of the system providing speedy and cheap access to redress unfair dismissals and limiting available remedies, in particular by capping compensation.[122]

These submissions were criticised by Peter Buirski,[123] in that the effect on prohibiting legal representation is to deny legal representation, even in complex cases where, in terms of common law, an administrative tribunal such as the commission would otherwise have had a discretion to permit such representation.[124] He went further to note that the task team was well aware of this problem but gave consideration to having all simple dismissal cases and those

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119 1995 *ILJ* 319.
120 Judgment in *Law Society of the Northern Provinces v CCMA* 328-329.
121 Schedule 8 to LRA.
122 Benjamin 1994 *ILJ* 250.
123 Buirski 1995 *ILJ* 529.
124 1995 *ILJ* 529 532.

that do not raise issues of principle determined by arbitration and complex cases or those that do raise issues of principle determined by the Labour Court. The problem in this regard is drawing a distinction and finding acceptable criteria for giving effect to it.[125]

The task team ignored the advantages of having a legally trained person. Counsel can act as a deterrent to the summary dismissal of a party's case; bridge possible hostilities between the parties and members of tribunal.[126] Legal representatives have the ability to interpret relevant statutory provisions and to ensure consistency in administrative decision making by marshalling whatever prior decisions of the tribunal or the courts serve as guide to the exercise of administrative discretion.[127]

Parties to the arbitration proceedings are entitled to call witnesses, lead evidence, cross examine witnesses and submit closing arguments before the commissioner. It was for these factors that the court in *Ibhayi City Council v Yantolo*,[128] that the court found that in terms of regulation 13(2)(a)[129] at an enquiry the employee or his representative shall have a right to cross-examine any person called as a witness in support of the charge, to inspect any documents produced in evidence, to give evidence himself and to call any other person as a witness. The court went further to note that there was no rule of natural justice or rule of practice in labour matters that determined that the word "representation", where it was not qualified, meant a lay representation only.[130]

The effect of the decision in the case of *Law Society of the Northern Provinces v CCMA* is that there is no unqualified Constitutional right to legal representation before an administrative tribunal. The court noted finally that in fact, the Law Society did not present any evidence that the sub-rule works hardship on parties

125 Buirski 1995 ILJ 532.
126 Buirski 1995 ILJ 535.
127 Buirski 1995 ILJ 535.
128 *Ibhayi City Council v Yantolo* 1991 3 SA 665 (E) at 673J-674B.
129 The draft *Labour Relations Bill* of 1995.
130 1995 *ILJ* 536.

to CCMA arbitrations or point to any instance where there has been refusal of legal representation prejudicing a party.[131]

In the latest decision in a case of *National Union of Mine workers v Commission for Conciliation Mediation and Arbitration*,[132] an employee was dismissed and then dispute was referred to CCMA for arbitration. The Commissioner disallowed legal representation and advised the applicant to seek services of the union to represent him at arbitration proceedings. The matter was taken on review by the employee to the Labour Court. Although the Labour Court reviewed and set aside postponement and dismissal rulings of the commissioner and referred the matter back to the CCMA to start *de novo* before another commissioner due to gross irregularity on the aspect of postponement. The court confirmed the issue of legal representation by the commissioner and ruled that it should not be entertained by another commissioner.

The matter was ultimately taken to the Labour Appeal Court where the court upheld the decision of the Labour Court and dismissed the appeal.[133] The court held that in dealing with the discretionary decision to allow legal representation the court must consider whether the arbitrator properly took into account all factors in coming to its decision, and whether the decision arrived at is justified, the court went further to note that where it is clear that the commissioner was alive to the factors listed in CCMA rule 25(1)(c), no other inference but that the commissioner did in fact consider the other factors listed in rule 25(1)(c) can be drawn from this. The court found that the commissioner does not have to go through each and every one of the factors in the reason given in the award.

8 Conclusions and recommendations

South Africa as a Constitutional democracy is governed by the Constitution which was finally enacted in 1996.

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131 *Law society of the Northern Provinces v CCMA* 2014 2 SA 321 (SCA) 336.
132 *National Union of Mineworkers v Commission for Conciliation Mediation and Arbitration* (JA90/2013) [2014] ZALAC 51 (1 October 2014).
133 Worklaw 2014 http:www.worklaw.co.za/newsletter/the-judgement-in *NUM v CCMA*.

The Constitution is the supreme law of the country and every legislation must comply with the provisions of the Constitution and all that is required by the Constitution must be adhered to, hence there is a Constitutional court which is the apex of all Constitutional matters.

The Labour Relations Act of 66 1995 was enacted to make sure that labour rights are protected in accordance with provisions of section 23(1) of the Constitution which stipulate that everyone has a right to fair labour practices. Section 23 of the Constitution to make sure that there is a balance in terms of the relationship between an employer as master and the employee who is a servant.

Additional section 23, the Constitution also makes provision in terms of section 33 and 34. According to which everyone is guaranteed a right to administrative action that is lawful, reasonable and procedurally fair, also a right to have a dispute resolved by applying the law in a fair public hearing before a court or an independent and impartial tribunal.

The focus of this study was whether rule 25 of the LRA is fair and Constitutional in limiting a right to legal representation in dismissal cases involving fairness of dismissals for misconduct or incapacity. The reasoning behind this rule is said to be an attempt to avoid an unreasonable delay in less complex matters involving dismissals.

It is a fact that dismissal cases for incapacity and misconduct emanates from disciplinary proceedings which in all cases are initiated by the employer who is in fact the one in charge of the proceedings because the employer used their resources to appoint chairpersons of the hearing who at times are even legally trained.

It has been proven that in a huge number of those cases employees end up being dismissed and this matter will ultimately reach conciliation and finally arbitration at CCMA.

Case law has shown that the biggest problem which commissioned and ultimately our courts have with legal representative or administrative tribunals and or CCMA in cases mentioned above, is purely on the basis that lawyers are capable of prolonging a simple matter by applying legal labour and jargon which may ultimately complicate the matter.

The study has shown in particular that in South Africa, in case law there is a generally accepted legal position that legal representation should not be viewed as of right or arbitration involving fairness or dismissal for misconduct and incapacity.

Although it is not incorrect to insinuate that lawyers may abuse the process of administrative tribunal, the commissioner who chairs the proceedings has discretion.

It is a fact that in most cases where legal representation was not allowed the party against whom the award was granted will most probably question the fairness of the proceedings by seeking review from labour court. This position is, however, problematic because there is never a quick solution for dismissal cases involving fairness of dismissal for misconduct and or incapacity as the process becomes a recurring one due to the fact that an aggrieved party would seek a review citing reasons that he or she was not offered an opportunity to use the services of a legally trained person who is better suited to interpret the law, lead evidence, cross question witness and ultimately address the commissioner at the end of the proceedings.

The contentions made in some of judgements discussed are that legal practitioners will render these proceeding technical. It is clear that the commissioner is a chairman and his or her duty is to make sure that a legal practitioner does not turn into technical legal fracas and if it does happen, the arbitrator should be in a position to deprive the practitioner from doing so. Whereas it is true that rule 25 should be intergraded with caution, it would be proper for the commissioner to consider allowing skilled legal practitioners who will be able to conduct the proceedings professionally and speedily.

It is highly likely that use of legal representation of these proceedings may assist in proper application of the Act and this may ultimately reduce the number of awards which are taken on review.

Bibliography

Literature

Baxter *Administrative Law*

Baxter L *Administrative Law* Vol 1 (Juta Cape Town 1984)

Benjamin 1994 *ILJ*

Benjamin P "Legal representation in labour courts" 1994 *Industrial Law Journal* 250-260

Benjamin "Assessing South Africa's CCMA"

Benjamin P "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration" (CCMA) ILO Industrial and Employment Relations Department Working Paper No 47 April 2013) 1-6

Brassey *Employment and Labour Law*

Brassey M *Employment and Labour Law: Commentary on Labour Relations Act* Vol 3 (1998)

Buirski 1995 *ILJ*

Buirski P "The Draft Labour Relations Bill 1995 – The case for legal representation at its proposed for a for dispute resolution"1995 *Industrial Law Journal* 529-543

De Waal, Currie and Erasmus *The Bill of Rights Handbook*

De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 4th ed (Juta Cape Town 2001)

Grogan *Labour Litigation and Dispute Resolution*

Grogan J *Labour Litigation and Dispute Resolution* (Juta Cape Town 2010)

Van Dokkum 2000 *ILJ* 836-845

Van Dokkum N "Legal representation at the CCMA" 2000 *Industrial Law Journal* 836-845

Case law

Afrox Ltd v Laka & Others [1999] 5 BLLR 467 (LC)

Badingwato & Others v Head of Nyanda Regional Authority & Another: Hlantlalala v Head of the Western Tembul and Regional Authority & Others 1998 2 SACR 16 (TK)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 4 SA 490 (CC)

Bell Porto School Governing Body v Premier, Western Cape 2002 3 SA 265 (CC)

CCMA v Law Society of the Northern Provinces (005/13) 2013 ZASCA 118

CCMA v Law Society of the Northern Provinces 2014 2 SA (SCA)

CCMA v Malan [1997] 9 BLLR 1173 (LC)

Commuter Handling Services (Pty) Ltd v Mokoena & Others 2002 23 ILJ 1400 (LC)

Coyler v Essack NO & Other 1997 18 ILJ 1382 (LC)

Cuppan v Cape Display Chain Services 1995 16 ILJ 846 (D)

Dabner v SA Railways & Harbours 1920 AD 583

Dladla & Others v Administrator, Natal & Others 1995 3 SA 776 (N)

Engen Petroleum Ltd v CCMA & Others [2007] 8 BLLR 707 (LAC)

Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others 2002 5 SA 449 (SCA)

Harksen v Lane (1998) 1 SA 300 (CC)

*Ibhayi City Council v Yantolo*1991 3 SA 665 (E)

Judicial Service Commission v Cape Bar Council 2012 ZASCA 115

Lace v Diack 1992 13 ILJ

Minister of Health and No v New Clicks South Africa (Pty) & Others 2006 2 SA 311 (CC)

Morali v President of the Industrial Court & Others 1986 4 ILJ 690 (IC)

National Union of Mine Workers v CCMA & Others (JA90/2013) [2014] ZALAC 51

Ndlovu v Mullins 1999 20 ILJ 177 (LC)

Netherburn Engineering CC t/a Ceramics v Mudau & Others 2009 30 ILJ 269 (LAC)

Netherburn Engineering CC t/a Ceramics v Mudau & Others 2009 30 ILJ 1521 (CC)

Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & Others 2005 24 ILJ 1712 (LC)

Norman Tsie Taxis v Pooe & Others 2005 26 ILJ 109 (CC)

Pilleteir v B & E Quarries (Pty) Ltd v CCMA 2000 21 ILJ 624 (LC)

Prinsloo v Van der Linden 1997 3 SA 1012 (CC)

SA Post Office v Govender & Others 2003 24 ILJ 1733 (LC)

Samson v CCMA 2010 31 ILJ (LC)

Secunda Supermarket CC t/a Secunda Spar & Another v Dreyer NO & Others 1998 19 ILJ 1584 (LC)

Sidumo & Another v Rustenburg Platinum Mines Ltd & Others 2008 2 SA 24 (CC)

South African Technical Officials' Association v President of the Industrial Court & Others 1985 1 SA 597 (A)

Strydom v CCMA & Others [2004] 10 BLLR 1032 (LC)

Yates v University of Bophuthatswana & Others 1994 3 SA 815 (BGD)

Zondi v MEC Traditional and Local Government Affairs & Others 2005 3 SA 589 (CC)

Legislation

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Draft Labour Relations Bill of 1995

Labour Relations Act 66 of 1995

National Economic Development and Labour Council Act 35 of 1994

Prevention of Unfair Discrimination Act 4 of 2000

Promotion of Administrative Justice Act 3 2000

Regional Authority Courts Act 13 of 1982

Internet sources

Worklaw 2014 http://www.worklaw.co.za/articles/the-judgement-in-numvs-ccma

Worklaw 2014 *The judgement* in *NUM v CCMA* http://www.worklaw.co.za/articles/the-judgement-in-num-vs-ccma [date of use 18 Oct 2014]