

# EMPLOYMENT ALERT

7 October 2013

## CLOSING THE DOOR: LEGAL REPRESENTATION IN THE CCMA

As a general rule litigants are entitled to legal representation at the Commission for Conciliation, Mediation and Arbitration (CCMA) arbitrations unless the issue relates to an alleged unfair dismissal and that the reason for the dismissal relates to the employees alleged misconduct or incapacity.

The above limitation is embodied in Rule 25(1)(c) of the CCMA rules and has been the subject of some hotly contested litigation over the past two years.

### **The North Gauteng High Court**

On 15 October 2012 the High Court handed down judgement in the matter of *Law Society of the Northern Provinces v Minister of Labour and Others (2012) 33 ILJ 2798 (GNP)*, wherein the court seemed to finally resolve the issue by ruling that Rule 25(1)(c) was constitutionally invalid.

The declaration of invalidity was however suspended for a period of 36 months so as to enable all of the relevant to promulgate a new sub rule dealing with legal representation.

Subsequent to this an appeal was cited against the court's decision and accordingly the matter proceeded to the Supreme Court of Appeal (SCA). The SCA's decision has been reported as *CCMA v Law Society, Northern Provinces (005/13) [2013] ZASCA 118* (20 September 2013).

### **The SCA**

The appeal was argued early in September 2013 and judgement was delivered on 20 September 2013.

The Law Society's attack on the limitation by the Rule was confined to the fact that it constituted unfair discrimination against legal practitioners who were effectively excluded from representing their clients in dismissals relating to misconduct or incapacity.

The SCA in coming to its decision considered the history of the Rule and its limitation, including the fact that the CCMA has the power to regulate its own process and accordingly both the Rule and the limitation had been enacted in accordance with this power.



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In considering the rationale for the Rule and its limitation, the CCMA tendered compelling evidence on the early negotiations which took place at the National Economic Development and Labour Council (Nedlac), and which premised the limitation on the fact that the majority of cases involving dismissals for misconduct or incapacity were less serious and generally less complex. Given this, it had been decided that such disputes should be adjudicated swiftly and with the minimum of legal formalities i.e. no automatic right to legal representation.

The SCA held that the mere fact that the Rule distinguished between different kinds of cases did not render the Rule as irrational. It went on further to state that:

*"The history of the subrule and the nature of the historical compromise reached, showed that the bulk of cases referred to the CCMA involve unfair dismissals for incapacity and misconduct. The legislature identified these matters as the appropriate category where the policy considerations underlying the need to exclude legal representation should find application. The courts cannot interfere with rational decisions that have been made lawfully on the ground that they consider a different decision preferable"*

The SCA held that it had been fatal that the Law Society had not alleged any infringement on the dignity of legal practitioners as the right to equality was inextricably linked to an infringement of dignity.

Furthermore there is no unqualified constitutional right to legal representation before administrative tribunals and the Law Society did not present any evidence where a litigant had been prejudiced as a result of being refused legal representation.

Accordingly the SCA upheld the appeal, however it appears likely that the matter will be taken on further appeal to the Constitutional Court for final analysis and determination.

Unless the Constitutional Court overturns the SCA's decision, litigants in misconduct and incapacity disputes will need to bring timeous applications for legal representation to open the door and secure legal representation.

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