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EMPLOYMENT ALERT

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The battle of legislation: The presence of legal representation during misconduct or incapacity related arbitrations

The CCMA, empowered by s115(2A)(k) of the Labour Relations Act (LRA), enacted Rule 25 in January which allows a party in an arbitration dispute to appear in person or be represented by a legal practitioner, candidate attorney or an entitled party in terms of sub-rule 1(a).

The battle of legislation: The presence of legal representation during misconduct or incapacity related arbitrations

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Accordingly, parties are automatically entitled to legal representation unless the dispute regards dismissal due to conduct or capacity. In such cases, legal representation is not allowed unless agreed upon by both parties to the dispute or permitted by the Commissioner.

Additionally, no legal representation is allowed in facilitations of large scale retrenchments as contemplated in s189A(3) of the LRA.

Contrary to this, the Legal Practice Act, No 28 of 2014 which came into effect late last year, brought with it a new s25 which states that a legal practitioner has the right to appear before any board, tribunal or similar institution.

Thus, we have a conflict of the CCMA Rules empowered by the LRA and the Legal Practice Act.

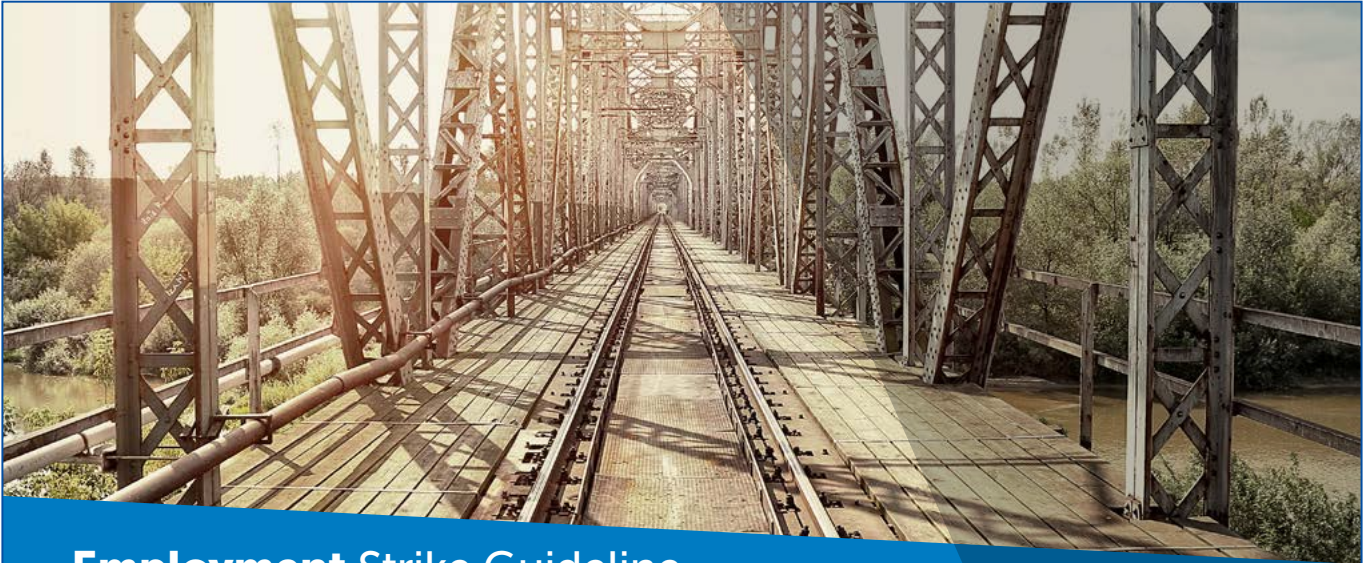
The CCMA issued Directive No. 1 of 2019 in January, stating that as the CCMA Rules are empowered by the LRA, their rule trumps any other as the LRA, in s210, states that in times of conflicting legislation, it will always prevail (save the Constitution or amendments to the LRA).

A Commissioner at the Dispute Resolution Centre (DRC) however, recently ruled in the matter of *Coetzee v Autohaus Centurion*, that s25 of the Legal Practice Act gives an attorney the right of appearance at any court, tribunal or any board, subject to any other law and that the only other applicable is the LRA. Further, that the LRA does not deal with legal representation, and that a Bargaining Council, such as the CCMA's, rules are not law, hence legal practitioners are not prevented in any way from representing parties in conduct or capacity arbitrations.

While the rulings of bargaining councils do not carry the force of *stare decisis* (which binds courts to follow legal precedents set by previous decisions), it will certainly be interesting to fault this argument in other forums. Let the battle commence.

Hugo Pienaar and Michaela Grieve

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