

# Employment Law

## ALERT

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INCORPORATING  
**KIETI LAW LLP, KENYA**

### IN THIS ISSUE

#### 2023 amendments to the CCMA Rules

On 21 April 2023, the Commission for Conciliation, Mediation and Arbitration (CCMA) published amended Rules for CCMA proceedings (Rules). These Rules include several new additions and alterations. We highlight some of the amendments which warrant attention below. The Rules came into effect on 24 April 2023. There are also fresh referral forms that now need to be used.



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### Compliance with data protection legislation

Rule 1A requires parties to comply with data protection legislation, such as the Protection of Personal Information Act 4 of 2013 (POPIA). This applies to serving and filing documents and the processing of personal information. Employers should be aware of their POPIA obligations in this regard to avoid falling foul of the Rules and POPIA whilst litigating in the CCMA.

### Modes of service and filing

A significant amendment throughout the Rules is the removal of fax as an accepted form of filing. Rule 2(3) and Rule 7(2) have been amended to reflect this change.

The CCMA's official electronic referral online portals are now the preferred method for communication.

These amendments are reflected in various rules. For one, parties may apply for condonation under Rule 9(2A) on the online portals. Parties may also now refer a dispute for conciliation and arbitration on the online portals, under Rules 10(1) and 18(1), respectively.

### Condonation

Rule 10(2)(b) still provides for an application for condonation to be attached to a conciliation referral form if the referring party is late. Rule 10(3) has now been inserted, which stipulates that the CCMA will determine whether condonations will be decided at a hearing or only by written submissions. So, there may now be fewer in limine condonation hearings in future.

### Postponements

Previously, if all parties agreed to a postponement seven days before a hearing, the CCMA was under an obligation to postpone the proceedings. The word "must" in Rule 23(2) has now been changed to "may" to reflect that "The Commission may postpone an arbitration without the parties appearing". In addition, Rule 23(5) has been added to the Rules, which confirms that "There is no right to postponement."

This signals that securing postponements in the CCMA are going to be more difficult in future.



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## 2023 amendments to the CCMA Rules

CONTINUED

### Picketing rules

Rule 13(1A) brings the issue of picketing rules in line with the law and provides that picketing rules must first be established before a certificate of non-resolution can be issued, unless a signed picketing agreement is provided to the CCMA at the conciliation.

Additionally, Rule 31A now prescribes the process to be followed in applying for urgent picketing rules or the determination of disputes relating to them. The section relates to applications for picketing rules in terms of section 69(6B), disputes relating to picketing agreements and disputes concerning section 69(8) of the Labour Relations Act 66 of 1995 (LRA). Importantly, unless agreed otherwise by the parties, the CCMA must set down the application within two days of receipt of the application.

### Removal of cheques as an accepted form of payment

The Rules now require payment by electronic transfer into the CCMA's bank account.

Bank guaranteed cheques are no longer accepted forms of payment for inquiries in terms of section 188A of the LRA.

### Referring party not attending arbitration

Rule 30(1) now obliges the Commissioner to establish the reason for non-attendance. If there is a good reason for absence, only then will the Commissioner reschedule. The referral will not be dismissed as was the case previously. This was the result of a change subsequent to a Labour Court judgment which gave rise to removals from the roll and not a dismissal of the claim.

Rule 31C now prescribes the process to be followed for a request to have an arbitration re-enrolled. A party may now submit a request for re-enrollment within 14 days of becoming aware that the matter has been removed from the roll. The rule also provides for the other party to oppose within seven days from receipt of the request for re-enrollment. This is helpful as there has been much uncertainty around opposition of the last period.

Rule 32(2) provides that applications to vary or rescind arbitration awards or rulings do not apply to decisions taken by the CCMA to remove a matter from the roll. In other words, a referring party no longer needs to apply for a rescission. The referring party would only need to seek a re-enrollment of the arbitration.

## 2023 amendments to the CCMA Rules

CONTINUED

### Request for documents

Rule 37(1) provides clarity by stating that requests for documents and material must be made in terms of Rule 29 and not in terms of Rule 37.

### CCMA closure

Prior to the amendments to the Rules, the old Rule 3(2) provided that when calculating time periods, the last day must be excluded if it falls on a Saturday, Sunday, public holiday, or the period between 16 December and 7 January. That part of the rule which referred to the period between 16 December and 7 January has now been removed in the amendments to the Rules.

This removal also suggests that the CCMA may now continue to schedule matters in the period between 16 December and 7 January for processes.

### Rule 17 and the *Valinor Trading* judgment

Rule 17(2) provides the timeline within which a party can object to con-arb. This rule has not been amended, which is surprising because of the *Valinor Trading* judgment (which we discussed in [this alert](#)) where the Labour Court held that a Commissioner is not empowered to proceed with an arbitration and ignore an objection irrespective of the timing within which the objection was filed.

The CCMA subsequently sought leave to appeal the judgment in *Valinor Trading 133 CC t/a Kings Castle v The CCMA and Others* (JR292/19) [2023] ZALCJHB 10 (3 February 2023) and was not successful. Perhaps the CCMA will petition the Labour Appeal Court.

But as the CCMA was not successful in the leave to appeal application, the principle in *Valinor Trading* continues to apply under the new Rules.

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