

# Employment Law

## ALERT

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INCORPORATING  
**KIETI LAW LLP, KENYA**

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#### The discretion of a commissioner to dismiss a matter and the amended CCMA rules

Section 138(5)(a) of the Labour Relations Act 66 of 1995 (LRA) provides a commissioner with the power and discretion to dismiss a matter in instances where the referring party fails to appear for the arbitration. In 2021, the Labour Court in *Solomons v Food Lovers Market, Kempton Park* (JR99/2021) diluted a commissioner's power to dismiss a matter in these circumstances.

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## The discretion of a commissioner to dismiss a matter and the amended CCMA rules

Section 138(5)(a) of the Labour Relations Act 66 of 1995 (LRA) provides a commissioner with the power and discretion to dismiss a matter in instances where the referring party fails to appear for the arbitration. In 2021, the Labour Court in *Solomons v Food Lovers Market, Kempton Park* (JR99/2021) diluted a commissioner's power to dismiss a matter in these circumstances.

The Labour Court held that the commissioner can only dismiss a matter after the merits of the matter were assessed and since this exercise would not have taken place in a situation contemplated by section 138(5)(a) of the LRA, the meaning ascribed to the word "dismiss" is akin to striking a matter from the roll, which would provide the referring party with an opportunity to re-enroll the matter for arbitration without the need to apply for a rescission of the dismissal ruling. Subsequently, the Commission for Conciliation, Mediation and Arbitration (CCMA) issued a directive on 5 October 2021 (directive) to comply with the Labour Court's interpretation of section 138(5)(a) of the LRA.

In the recently published amended rules of the CCMA, Rule 30 has been amended to align with the *Solomons*

case and the directive by only making provision for the removal of the matter from the roll if the referring party fails to attend the arbitration and implementing a process by way of Rule 31C for the re-enrollment of the matter.

On 18 May 2023, the Labour Appeal Court in *Mohube v CCMA and Others* (JA18/2022) clarified the position in respect of the Labour Court's view in *Solomons* and the discretion of a commissioner to dismiss a matter in terms of section 138(5)(a). The LAC restored the power of a commissioner to dismiss a matter where the referring party fails to appear for the arbitration. In correcting the Labour Court's interpretation, the LAC held that dismissal should be an action of last resort and the commissioner is required to exercise this discretion by applying their mind to the matter

and not to approach it mechanically, as well as appreciating that the respondent is deserving of having finality in the matter.

Accordingly, the LAC judgment confirms that commissioners have the power to dismiss matters in terms of section 138(5)(a) of the LRA and the referring party may, if it is aggrieved by and disagrees with the dismissal ruling, apply to have the ruling rescinded in terms of section 144 of the LRA.

The CCMA has repealed the directive and has indicated that it will publish guidelines shortly on what factors may be considered by a commissioner when exercising the power to dismiss and the status of pending matters.

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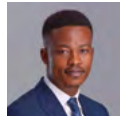
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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