

Employment Law

ALERT

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INCORPORATING
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IN THIS ISSUE

Do the CCMA rules empower a commissioner to ignore a late con/arb objection and proceed with an arbitration in terms of section 191(5)(a)(c) of the LRA?

In a recent decision of the Labour Court in *Valinor Trading 133 CC t/a Kings Castle v The CCMA and Others* (JR292/19) [2023] ZALCJHB 10 (3 February 2023), the court answered “no” to this question.



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In a recent decision of the Labour Court in *Valinor Trading 133 CC t/a Kings Castle v The CCMA and Others* (JR292/19) [2023] ZALCJHB 10 (3 February 2023), the court answered “no” to this question.

The dispute in this matter related to the termination of an agreement between an individual and the company. The individual referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The matter was set down for conciliation/arbitration (con/arb). The company objected to the immediate commencement of arbitration after conciliation as contemplated by section 191(5A)(c) of the Labour Relations Act 66 of 1995 (LRA). However, the objection was delivered late in terms of the CCMA rules. As a result of the late objection, the commissioner proceeded with the arbitration and issued a default arbitration award. The company applied to have the default award rescinded. The commissioner dismissed the application. There are some further technicalities related to this rescission application and a subsequent application which are not the focus of this article and accordingly will not be covered.

The court held that where a party has objected in terms of section 191(5A)(c) of the LRA, irrespective of the timing of the objection, a commissioner is not empowered to proceed with the arbitration or to ignore the objection. Should a commissioner ignore the objection and proceed, the decision that follows is a nullity or is void. The court drew attention to the fact that the relevant LRA section does not prescribe a time period within which to object and accordingly the rules of the CCMA cannot prescribe a time period. In this regard, a commissioner should not be restricted to complying with the time periods prescribed in the CCMA rules and has the discretion to condone any failure to comply with the time periods with a view to achieving the aims of the LRA as provided for in terms of Rule 35.

In interpreting the CCMA rules, the court held that the rules, including the relevant Rule 17 proposing the time period of seven days, do not prescribe that if a notice of objection is received late, that the objection is

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Cliffe Dekker Hofmeyr

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null and void. If, however, one reads the CCMA rules to indicate otherwise, this would result in a conflict between the LRA and the CCMA rules. In such an instance, the LRA would prevail, according to section 210 of the LRA. Quoting the Labour Appeal Court's finding in *Premier Gauteng and Another v Ramabulana N.O4* [2008] 29 ILJ 1099 (LAC), the Labour Court endorsed the following principle:

"...it is the Act [LRA] that provides for the making of CCMA Rules...it empowers the CCMA to make the rules 'regulating the practice and procedures.... This means that such rules...are not meant by the Act to take away any substantive right of any party. At any rate, where the Act confers a right on a party, the CCMA Rules cannot take that away. Any rule that does that would be in conflict with the Act – an untenable situation."

In other words, reading the time period for a party to exercise its objection to con/arb, within the context of the rules and the LRA, it follows that a notice not given at least seven days prior to the set down date does not render the objection defective to the extent that it can be ignored or deemed invalid. Any other reading that renders the objection ineffective is in conflict with the LRA and in such an instance the LRA would prevail, meaning that the objection remains valid irrespective of whether it complied with the time period set out in the CCMA rules.

In conclusion, the court found that the commissioner was not empowered to ignore the notice of objection by the company and accordingly was not authorised to

proceed with the arbitration. In this regard, the failure of the company to appear was not a failure to appear for arbitration since no arbitration could lawfully commence considering the notice of objection that was delivered by the company. In light of this, the default arbitration award was erroneously issued, and the commissioner ought to have granted the rescission application.

The court rescinded and set aside the default arbitration award.

**Nadeem Mahomed and
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