LEGAL REPRESENTATION AT THE CCMA

Law Society of the Northern Provinces v Minister of Labour 2013 (1) BLLR 105 (GNP) and *CCMA v Law Society, Northern Provinces* 2013 (11) BLLR 1057 (SCA)

1 Introduction

In *Law Society of the Northern Provinces v Minister of Labour* (2013 (1) BLLR 105 (GNP); 2013 (1) All SA 688 (GNP)) the Law Society of the Northern Provinces applied to the North Gauteng High Court for an order declaring rule 25(1)(c) of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (*GG* 25515 of 10 October 2003) (Rules) unconstitutional. The application was opposed by the Minister of Labour, the Minister of Justice and Constitutional Development, the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Director of the CCMA.

2 Statutory framework

Section 115(2A)(k) of the Labour Relations Act 66 of 1995 (LRA) provides that the CCMA may make rules regulating the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings. To this end, rule 25(1)(c) of the Rules provides as follows:

> "25. Representation before the Commission
> (1) …
> (b) In any arbitration proceedings, a party to the dispute may appear in person or be represented only by:
> (1) a legal practitioner;
> (2) a director or employee of that party and if a close corporation also a member thereof; or
> (3) any member, office bearer or official of that party's registered trade union or registered employer's organisation.
> (c) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite subrule (1) (b), are not entitled to be represented by a legal practitioner in the proceedings unless –
> (1) the commissioner and all the other parties consent;
> (2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
> (a) the nature of the questions of law raised by the dispute;

(b) the complexity of the dispute;
(c) the public interest; and
(d) the comparative ability of the opposing parties or their representatives to deal with the dispute."

3 Standing

In the *Law Society of the Northern Provinces case* (*supra*), Tuchten J first had to determine whether the Law Society had the requisite standing to bring the application. The Law Society submitted that it had *locus standi* to bring the application on the basis that its membership comprises every attorney, notary and conveyancer in Gauteng, Mpumalanga, Limpopo and portions of the North West Province. The Law Society further submitted that it is empowered by statute and the common law to "[m]aintain and enhance the status of the profession, generally to represent its members and to deal with and protect all matters touching upon the interests of the profession" (par 5).

The Law Society's standing was disputed in the Respondents' answering affidavit, but they failed to address the court on this issue in argument. Consequently, the case proceeded without the need for the court to decide the issue. Tuchten J, relying on the judgment of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (2000 (2) SA 1 (CC)), remarked that the Law Society "[m]ay properly rely on the objective unconstitutionality of the measure for the relief sought even though the right unconstitutionally infringed is not that of the Law Society but of some other person …" and that the Respondents' decision not to challenge the *locus standi* of the Law Society was "[a] wise one" (par 6).

4 The CCMA, Commissioners and the dispute-resolution process generally

After having disposed of the Respondents' submission that the Law Society lacked the requisite *locus standi* to bring the application, Tuchten J proceeded to explain that the CCMA is a statutory body, established under section 112 of the LRA, and had as its primary function the resolution of disputes referred to it in terms of the LRA. Tuchten J also defined the role of commissioners of the CCMA as having been tasked with the responsibility of giving effect to the primary function of the CCMA, that was, to attempt to resolve disputes referred to it in terms of the LRA. He also provided a brief overview of the dispute-resolution process as envisaged in the LRA. In this regard, the dispute-resolution process entailed the conduct of compulsory conciliation proceedings which, if it did not result in the settlement of the dispute, was followed by the conduct of arbitration proceedings. At arbitration proceedings, commissioners are afforded a wide array of powers, including conducting the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly and dealing with the substantial merits of the dispute with the minimum of legal formalities.

5 Administrative action

Tuchten J, referring to *inter alia* the cases of *Sidumo v Rustenburg Platinum Mines* (2008 (2) SA 24 (CC)) and *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* (2002 (5) SA 449 (SCA)), confirmed that an arbitration tribunal constituted under the auspices of the LRA was not a court of law and that a commissioner conducting an arbitration under the auspices of the CCMA was essentially performing an administrative function. According to Tuchten J, this is an important observation as there was no general entitlement to legal representation in dispute resolution forums other than courts of law. It was, therefore, held that the LRA, which authorized administrative action, had to be read together with the Promotion of Administrative Justice Act 3 of 2000 (PAJA) unless the provisions of the authorizing statute were inconsistent with PAJA in which case the provisions of the authorizing statute would prevail. In this regard, Tuchten J stated as follows:

> "An arbitration tribunal constituted under the LRA is not a court. A commissioner conducting a CCMA arbitration is performing an administrative function. This is important because, as the law stands, there is no general entitlement to legal representation in arenas in which disputes are resolved except in courts. However, under s 3(3)(a) of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA'), administrators as that term is used in PAJA, including presiding officers in administrative tribunals, must consider on a case by case basis whether a person whose rights or legitimate expectations are (I would add: potentially) materially and adversely affected by administrative action should be given an opportunity to obtain legal representation. Statutes such as the LRA, which authorise administrative action, must be read together with PAJA unless, on a proper construction, the provisions of the authorising statute are inconsistent with PAJA" (par 15).

Accordingly, had the substance of rule 25(1)(c) of the Rules been contained in the LRA, it would have been possible to argue that the provision is in conflict with PAJA and that the LRA would therefore not need to be read with PAJA. However, Tuchten J held that this was not the case and that rule 25(1)(c) therefore needed to be consistent with PAJA, failing which a declaration of constitutional invalidity would ensue.

6 Unfair discrimination

The Respondents raised various points *in limine*, the first one being that, to the extent that the challenge as to the constitutionality of rule 25(1)(c) was based on alleged unfair discrimination, the proper forum which the Law Society should have utilised is the Equality Court and not the High Court.

The Respondents contended that the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) effectively deprived the High Court of jurisdiction to adjudicate constitutional challenges that were based on alleged unfair discrimination and that the Equality Court was the proper forum where such disputes were to be dealt with.

Referring to *Monong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape* (2009 (6) SA 589 (SCA)), Tuchten J held that a

person who was a victim of discrimination was not precluded by PEPUDA from bringing proceedings in the ordinary course in a High Court. The Respondents contended that the conclusion in *Monong* was arrived at *per incuriam* and that the court was therefore not bound by it. Tuchten J disagreed with the Respondents and held that it would be "[m]ost obstructive, to put it mildly, to the due administration of justice if a constitutional challenge against a single action or complex of actions which involved… alleged infringements of the Bill of Rights … had to be decided in two separate hearings" (par 20). He further held that "[i]f the legislature intended to abridge the jurisdiction of High Courts in such a singular manner, it would've done so in the clearest of language" (par 20).

The Respondents, in the alternative, contended that the court had concurrent jurisdiction with the Equality Court to determine the application and that the court should exercise its discretion and decline jurisdiction in favour of the Equality Court. Tuchten J declined to do so for various reasons. The Respondents, firstly, did not make such an argument in the papers before the court. Furthermore, the procedure in the Equality Court required that an inquiry took place which would take a considerable amount of time. Also, where a litigant had chosen in good faith one out of two or more available forums for its constitutional challenge, such a choice should be respected. Tuchten J further held that, as a matter of policy, the High Court should "[j]ealously guard its position as the arbiter of first instance of constitutional matters and should not, where there is jurisdiction concurrent with a court of similar status, decline jurisdiction unless it has been plainly shown that such court of similar status is, by reason of its specialist character, better suited to determine the particular constitutional matter placed before it" (par 21). Tuchten J, as the fifth reason for declining jurisdiction in favour of the Equality Court, stated that he had, in any event, received the relevant training as contemplated by section 31(4) of PEPUDA.

The Respondents' first point *in limine* was dismissed for the aforementioned reasons and the Respondents were, therefore, unsuccessful in proving that the Law Society should have utilised a different forum other than the court.

7 Second and third *in limine* points

According to Tuchten J, the second and third *in limine* points go to the heart of the dispute and these points are therefore discussed as part of the merits of the challenge. The second and third *in limine* points raised by the Respondents effectively translate into the submission that rule 25(1)(c) of the Rules is permitted by section 115(2A)(k) of the LRA read together with section 3(3) of PAJA.

Section 3 of PAJA is titled "Procedurally fair administrative action affecting any person" and subsection (3) provides that:

> "In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) [i.e. a person whose rights or legitimate expectations are materially and adversely affected by administrative action] an opportunity to –
>
> (a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and
(c) appear in person."

Rule 25(1)(c) restricts the right to representation by excluding legal practitioners ("legal practitioner" is defined in s 213 of the LRA to mean "any person admitted to practise as an advocate or attorney in the Republic") from appearance unless the parties and the commissioner consent to the appearance of a legal practitioner or if the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering various factors. These factors include: (a) the nature of the questions of law raised by the dispute; (b) the complexity of the dispute; (c) the public interest; and (d) the comparative abilities of the parties to deal with the dispute. It is evident from the aforegoing that rule 25(1)(c) fails to make provision for representation in "serious" cases.

The Law Society effectively contended that a reasonable or constitutional rationale was lacking as to why only practising legal practitioners had a qualified right to appear in dismissal disputes involving conduct or capacity. Tuchten J noted that rule 25(1)(c) did not affect the right conferred in rule 25(1)(b) in relation to other categories of representatives – only legal practitioners as defined were hit by the impugned subrule.

8 Legality and rationality

Tuchten J stated that the principle of legality meant that the exercise of public power was only legitimate when lawful and that the principle of legality required *inter alia* that conduct in the exercise of public power had not to be arbitrary or irrational. Accordingly, the Rules, the framing of which in themselves was an administrative decision, had to be rational. If the decision was such that no reasonable person could have taken it, the decision would be set aside. In this regard, consideration had to *inter alia* be given to the reasons advanced to justify the decision.

9 Reasons for exclusion of legal practitioners

In an attempt to justify the exclusion of legal practitioners from appearing in misconduct or incapacity disputes at the CCMA, the Respondents led evidence *inter alia* relating to the fact that the system within which the CCMA functioned was the product of a very particular social and legal context, negotiated by a variety of social partners and that the restrictions on legal representation were part of this context and the product of these negotiations.

The Respondents further alleged that it was inherent in the structure of adjudication of disputes by the CCMA that misconduct or incapacity disputes were less serious and that it should be adjudicated swiftly and with the minimum legal formalities. The Respondents specifically stated as follows:

> "disputes about whether individual[s] or groups of employees have breached company rules or are incapacitated to an extent that justifies their dismissal are less serious, are regulated by a detailed code of practice, and should be adjudicated swiftly and with the minimum of legal formalities" (par 28).

According to the Respondents, the presence of lawyers at the CCMA-arbitration process will result in delays, time-wasting and obfuscation of the real issues in dispute. In this regard, Tuchten J held that the solution employed by the High Courts is to try to staff courts with presiding officers who are equipped to deal properly with conduct of the nature referred to above and that, more often than not, the legal representatives contribute to the efficient and speedy resolution of disputes. Tuchten J accordingly found that there was no reason why this should not be the case in CCMA arbitrations as well.

Before dealing with the Respondents' submissions regarding the constitutionality of rule 25(1)(c), Tuchten J stated that the views of the CCMA had to be accorded substantial weight and be treated with a degree of deference by the court as it lacked the specialist expertise of the Labour Court. However, Tuchten J nevertheless held that the loss by an employee of his or her job was a very serious matter and he therefore disagreed with the Respondents' submission that the differentiation between dismissals on the basis of an employee's conduct or capacity and other dismissals was justifiable in light of the less serious nature of the former types of dismissals.

Tuchten J further referred to the judgment of *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* (2009 (4) BLLR 299 (LAC)) in which Musi JA held that section 140(1) of the LRA was rational and where he found that the seriousness of arbitrations concerning dismissals for misconduct did not of itself justify legal representation. Tuchten J noted, however, that section 3(3)(a) of PAJA did not apply in *Netherburn Engineering CC* as the LRA at that time dealt expressly with the question of legal representation – section 140(1) of the LRA, which was effectively replaced by rule 25(1) of the Rules, provided that:

> "If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties…are not entitled to be represented by a legal practitioner in the arbitration proceedings unless (a) the commissioner and all the other parties consent; or (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering– (i) the nature of the questions of law raised by the dispute; (ii) the complexity of the dispute; (iii) the public interest; and (iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute."

Musi JA held that, in respect of misconduct and incapacity arbitrations, a CCMA commissioner had a discretion at the commencement of proceedings to decide whether to allow legal representation. However, according to Tuchten J it often happened that a matter which appeared to be simple and straightforward at the commencement of proceedings turned out to be more complex than originally anticipated. The differentiation between dismissals based on misconduct or incapacity and other forms of dismissal could not therefore, according to Tuchten J, be justified on this basis.

Musi JA further held that it was rational to distinguish between dismissals based on misconduct and incapacity and other unfair dismissals as the former constitute by far the bulk of the disputes arbitrated by the CCMA. Tuchten J disagreed and held that it was arbitrary to categorize one case for

special treatment without giving consideration to the merits of each individual case.

10 Finding

Tuchten J found that, taking into account that PAJA was enacted to give effect to section 33 of the Constitution of the Republic of South Africa, 1996 (s 33 is titled "Just administrative action" and it *inter alia* provided that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair"), rule 25(1)(c) of the Rules was inconsistent with section 3(3) of PAJA. It was held that this was the case in so far as a commissioner dealing with a misconduct or incapacity dispute at the CCMA did not retain a discretion to allow legal representation in serious cases. Section 3(3) afforded an administrator a discretion to permit legal representation in serious or complex cases; however, rule 25(1)(c) did not permit a CCMA commissioner to take the seriousness of the dismissal dispute into account. Tuchten J held that the rule "[i]mpermissibly trenches upon the discretion conferred by s 3(3)(a) of PAJA in relation to serious cases" (par 39).

The Respondents submitted that a change to the current regime would significantly add to the workload of the CCMA and thus impair its ability to perform its core functions. Tuchten J refused to take this into account as a matter of principle and referred to *Sidumo* in which it was held that:

> "Employees are entitled to assert their rights. If by so doing a greater volume of work is generated for the CCMA, then the State is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated" (par 77).

Tuchten J held that the Respondents failed to establish that the limitation of the right to legal representation imposed under rule 25(1)(c) was reasonable and justifiable and he accordingly found rule 25(1)(c) of the Rules to be inconsistent with the Constitution and invalid.

11 Comment

The declaration of constitutional invalidity of rule 25(1)(c) was suspended for 36 months to enable the relevant parties to consider and promulgate a new subrule. It effectively meant that the limitation of the right to legal representation in circumstances where the dismissal related to the employee's conduct or capacity remained until such time as a new subrule is promulgated. However, as is evinced by the award of commissioner Jansen van Vuuren in *Khunoa v Africa Security Solutions Gauteng (Pty) Ltd* (2013 (4) BALR 397 (CCMA)), there appeared to be some confusion as to the status of rule 25(1)(c) following the finding of Tuchten J. In *Khunoa* (*supra*), the applicant-employee had been dismissed on the basis of alleged misconduct. He requested permission to be legally represented at the arbitration. The request was not made in the form of an application in terms of rule 25(1) of the Rules; he merely referred the commissioner to the judgment of Tuchten J in *Law Society of the Northern Provinces* (*supra*). The commissioner, after having considered the judgment of Tuchten J, stated

that "It is, with respect, difficult to reconcile the court's order with its view that section 3(3)(a) of PAJA can only be ousted by the Labour Relations Act itself and not by any CCMA Rule to be promulgated" (par 22). In this regard, the commissioner found that:

> "The suspension of the Court's declaration of constitutional invalidity simply means that rule 25(1)(c) is not deemed to be unconstitutional for now, but it does raise a question about the rule's current status. It is, after all, inconsistent with section 3(3)(a) of PAJA and the question is consequently whether the issue of legal representation should not, in any event, be dealt with in terms of that section. A Commissioner who conducts a CCMA arbitration does perform an administrative function and the absence of any provisions in the Labour Relations Act 66 of 1995 itself implies that the relevant provisions of PAJA should be complied with. A CCMA Rule can, after all not 'oust' PAJA …The question is whether a CCMA Commissioner who exercises his discretion should consider the factors enumerated in CCMA rule 25(1)(c) or those mentioned in section 3(3) of PAJA" (par 24, 25 and 26).

In deciding which approach to follow, the commissioner compared section 3(3) of PAJA to rule 25(1)(c) of the Rules and held that:

> "Tuchten J, at paragraph 39, pointed out that rule 25(1)(c) differed from section 3(3) of PAJA in that it did not confer a discretion in a serious but not complex case of dismissal for misconduct or incapacity. The learned Judge also stated that the said rule impermissibly 'trenched' upon the discretion conferred by section 3(3)(a) of PAJA in relation to serious cases. There are also other differences. PAJA makes no mention of the nature of the questions of law, the comparative ability of the parties or public interest. These are important considerations in the context of unfair dismissal arbitrations at the CCMA, but they presumably also abridge a Commissioner's discretion. The application in casu will consequently be considered in accordance with the provisions of section 3(3)(a) of PAJA instead of CCMA rule 25(1)(c)" (pars 28, 29 and 30).

However, apart from the questionable application of PAJA to CCMA proceedings in the abovementioned context, in *Khunoa* (*supra*) the commissioner failed to appreciate that the effect of suspending an order of invalidity was that the legislation, in this case rule 25(1)(c) of the Rules, for the period of suspension, remained of full force and effect (Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 210). In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa* (1995 (10) BCLR 1289 (CC)), the Constitutional Court, in relation to the suspension of orders of invalidity, stated as follows:

> "Section 98(5) [of the interim Constitution; cf s 172(1)(b)(ii) of the 1996 Constitution] permits this Court to put Parliament on terms to correct the defect in an invalid law within a prescribed time. If exercised, this power has the effect of making the declaration of invalidity subject to a resolutive condition. If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period, and the normal consequences attaching to such a declaration ensure" (par 106).

Accordingly, the fact that rule 25(1)(c) was declared unconstitutional did not mean that commissioners were empowered to follow section 3(3) of PAJA to permit legal representation in serious and complex cases. The declaration of constitutional invalidity of rule 25(1)(c) was suspended for 36 months to enable the relevant parties to consider and promulgate a new

subrule. In other words, in contradistinction to the approach followed in *Khunoa* (*supra*), rule 25(1)(c) of the Rules continued to apply in the interim.

Furthermore, in finding that rule 25(1)(c) does not confer a discretion on a commissioner to allow legal representation in serious cases which are not necessarily also complex and that this is contrary to the provisions of section 3(3) of PAJA and section 33 of the Constitution, Tuchten J held as follows:

> "The impugned subrule does not, as does s 3(3)(a) of PAJA, confer the discretion in a serious case which is not also a complex case. PAJA was enacted to give effect to s 33 of the Bill of Rights. The impugned subrule is in my view inconsistent with s 33 to the extent that it significantly abridges the discretion of the commissioner in a CCMA arbitration to afford the opportunity for legal representation in a serious but not complex case of dismissal for misconduct or incapacity. The impugned subrule also impermissibly trenches upon the discretion conferred by s 3(3)(a) of PAJA in relation to serious cases" (par 39).

According to Tuchten J, had rule 25(1)(c) conferred a discretion on a commissioner to allow legal representation in serious cases which are not complex, the rule would not have been inconsistent with section 3(3) of PAJA and section 33 of the Constitution. In other words, should the rule have been amended to make provision for legal representation in serious cases, the effect of Tuchten J's finding would be that it remains permissible for rule 25(1)(c) to restrict the right to representation by excluding legal practitioners from appearance as of right unless the nature of the case is such as to persuade the commissioner that the appearance of a legal practitioner is warranted or all parties and the commissioner consent to the appearance of the legal practitioner.

The Applicants had attacked the rationale behind the qualified right of practising legal practitioners to appear in dismissal disputes involving conduct or capacity; however, an amendment of the rule to provide for legal representation in serious cases would in any event mean that there is still no absolute right to legal representation – a CCMA commissioner retains a discretion to permit or refuse legal representation in misconduct or incapacity disputes on the basis of *inter alia* the seriousness of the dispute. This view is reinforced by the concluding remarks of Tuchten J that the finding of constitutional invalidity does not mean that there must be an unrestricted right to legal representation. On the contrary, Tuchten J held that the common law and section 3(3) of PAJA conferred a discretion to permit legal representation. In *Hamata v Chairperson*, *Peninsula Technikon Internal Disciplinary Committee* (2002 (5) SA 449 (SCA)), the Supreme Court of Appeal reaffirmed that at common law there was no entitlement as of right to legal representation in proceedings before statutory bodies and other tribunals and that the Constitution had not abrogated the common-law position. In terms of PAJA, the presiding officer must consider on a case-by-case basis whether a person whose rights or legitimate expectations are materially or adversely affected by administrative action, should be given the opportunity to obtain legal representation. In particular, presiding officers under PAJA must take into account not only the complexity of the matter, but also the seriousness.

Even if rule 25(1)(c) had been amended to bring it in line with section 3(3) of PAJA by incorporating into the rule the seriousness of the dispute as a factor in determining whether to permit or refuse legal representation in conduct or capacity disputes, the limitation of the general right of appearance of legal practitioners in conduct or capacity disputes would continue to apply. The finding of Tuchten J would therefore effectively result in an eventual broadening of the scope of the considerations currently operative under rule 25(1)(c) – the pertinent question then becomes to what extent it would be "unreasonable to expect a party to deal with the dispute without legal representation" given the "seriousness" of the dispute. It is uncertain on what basis a commissioner would ever be able to refuse legal representation where an employee has alleged that the matter was serious. In relation to the seriousness of an employee's dismissal, Tuchten J held as follows:

> "But I cannot agree that a dismissal of an employee is never a serious matter − for the employee. In a great number of cases, the employee's job will be his major asset. The loss of your major asset is a serious matter. Whether the dismissal is a serious matter for the employer is a different question, particularly where the job done by the allegedly offending employee is a humble one, in respect of which the supply of job seekers exceeds the demand of potential employers" (par 30).

It is difficult to conceive of many instances, if any, where the dismissal of an employee is not a serious matter. And even where the seriousness of the dispute (from an employee's perspective) is indeed questionable, one would imagine that, from a practice perspective, CCMA commissioners would tend to venture on the side of caution and permit legal representation rather than running the risk of rendering a reviewable award on the basis that legal representation had been refused as the employee's dismissal was not "serious" enough to warrant legal representation. Further adding to the uncertainty was the fact that Tuchten J failed to address the issue of the countervailing submissions of the parties to a dispute on the seriousness of the dispute by stating that "whether the Constitution and applicable legislation permit a differentiation in relation to legal representation at CCMA arbitrations where the dispute is serious for the one party and less than serious for the other, is outside the scope of the dispute before me and, therefore, this judgment" (par 30).

The considerations that are generally taken into account in determining, in terms of PAJA, whether a case is "serious or complex", were referred to in *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* (2003 (9) BLLR 963 (T)), where it was held that:

> "In order to determine whether a case is a 'serious or complex' one, regard should be had to such factors as the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential suitably qualified lawyers, the seriousness of consequences of an adverse finding, the availability of the persons who may well represent the applicant, the fact that there is a legally trained person presenting the case against the applicant, and any other fact relevant to the fairness or otherwise of confining the applicant to the kind of representation for which the representation rule expressly provides. These are pertinent factors" (par 27).

The factors referred to in the *Schoon case* (*supra*) in determining whether a case was "serious or complex" encapsulated those considerations enumerated in rule 25(1)(c) as well as other considerations not listed in the rule. It was also not a closed list of factors. Ostensibly, an amendment to rule 25(1)(c) could not, in any event, entail simply inserting into the rule a reference to "serious and complex" cases – the rule in its entirety would need to be reformed to bring it in line with section 3(3) of PAJA and those considerations that inform the meaning of the factors expressly listed therein.

Should rule 25(1)(c) have been amended by simply incorporating a reference to "serious and complex" cases, the legislature would effectively be conferring on CCMA commissioners the unenviable task of establishing the confines of "seriousness" as a ground for deciding whether to permit or refuse legal representation. And, in the absence of any constraints placed on the meaning of "serious" in rule 25(1)(c), the discretion afforded in rule 25(1)(c) to a commissioner would be rendered superfluous and the right to legal representation in conduct or capacity dispute would, effectively, be absolute. Such an approach to amending the rule would also have contradicted the general position that there was no entitlement as of right to legal representation in proceedings before statutory bodies such as the CCMA.

12 Appeal

The CCMA appealed the decision handed down by Tuchten J in *Law Society of the Northern Provinces case* (*supra*). The decision of the Supreme Court of Appeal is reported at *CCMA v Law Society, Northern Provinces* (2013 (11) BLLR 1057 (SCA)). The Supreme Court of Appeal overturned the judgment in *Law Society of the Northern Provinces case* (*supra*) and ruled that rule 25(1)(c) was not irrational nor did it constitute an infringement of any party's constitutional rights.

The court in *CCMA* (*supra*) examined the historical development of the labour dispensation as codified in the Labour Relations Act 66 of 1995 and the compromises reached by NEDLAC in the process. The court held that the bulk of cases referred to the CCMA concern unfair dismissals for incapacity and misconduct and that the legislature had identified these as categories where legal representation might correctly be excluded. In this regard, the court held, *inter alia*, as follows:

> "The fact that the subrule distinguishes between different kinds of cases does not *per se* render the rule irrational. The history of the subrule and the nature of the historical compromise reached show 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 judge in the court below disregarded the considered judgment of experts who first drafted the LRA; the social partners at NEDLAC who endorsed their views on the proper approach to legal representation before the CCMA and the extensive experience of the CCMA and labour courts that

> an automatic right to legal representation in these cases was inconsistent with the aim of expeditious and inexpensive resolution of these disputes. He did so without any evidence to support his own views" (par 22).

The Supreme Court of Appeal further held that Tuchten J had failed to consider a commissioner's wide-ranging discretion to allow legal representation in certain circumstances. The court stated that a request for legal representation might be made at any time of arbitration proceedings and the commissioner was allowed considerable latitude in permitting legal representation. The court also commented on the seriousness of the individual consequences of the dismissal:

> "It may be allowed where the commissioner and all the parties agree. In addition, the commissioner may allow it in exercising his or her discretion when he or she considers that it is 'unreasonable to expect a party to deal with the dispute without legal representation' after consideration of the listed factors … These factors may well, in a given case, include the seriousness of the individual consequences of a dismissal, assuming that this is not already encompassed by the subrule, which I doubt" (par 21).

The most concerning issue addressed by the Supreme Court of Appeal was the finding by Tuchten J that section 3(3)(a) of PAJA applied to CCMA proceedings. According to the court, although CCMA proceedings amounted to administrative action, it did not mean that administrative action was regulated solely by PAJA. The LRA might also provide for the conduct of specialised administrative proceedings within its area of application. The court held that the LRA had equally created a "separate regime … for the fair conduct of arbitrations by the CCMA" (par 20). PAJA could not therefore override the provisions of the LRA, including rule 25(1)(c). Accordingly, the rules drawn up by the CCMA in terms of the LRA superseded competing provisions in other legislation. The court held as follows in this regard:

> "Tuchten J found that rule 25(1)(1)(c) was inconsistent with s 3(3)(a) of PAJA because the subrule did not confer a discretion in a serious case which was not also complex. I do not think that PAJA applies to the procedures adopted by CCMA arbitrators. Neither s 33 of the Constitution nor PAJA precludes specialised legislative regulation of administrative action alongside general legislation such as PAJA. However, such specialised regulation must comply and be consistent with s 33. PAJA, as I have said, does not apply to the review of CCMA arbitrations. The LRA sets out in specific terms in ss 138 and 142 how CCNA (sic) arbitrations are to be conducted. The reasoning that the the Constitutional Court (sic) in Sidumo to hold that the LRA created a self-contained regime for reviews equally applies to the separate regime it created in those sections for the fair conduct of arbitrations by the CCMA. PAJA was accordingly inapplicable in this case."

For *inter alia* the reasons referred to above, the appeal was upheld and the application was dismissed with costs including the costs of two counsel. The Constitutional Court has subsequently refused the Law Society of the Northern Provinces leave to appeal to decision of the Supreme Court of Appeal with costs on the basis that such an appeal bore no prospects of success.

13 Conclusion

The LRA seeks to establish a labour-law dispensation premised partly on economy of costs and economy of scale, thereby enabling the speedy and efficient resolution of disputes adjudicated by the CCMA, and doing so in a fair manner. It is in view of the aforegoing that the judgment of the SCA was well received; particularly in so far as the interests of the parties themselves to disputes at the CCMA are concerned. Excessive legalism will generally not serve the interests of parties to disputes that are subject to CCMA-arbitration proceedings; it may, however, serve the interests of the attorney profession, the latter interests not being the primary concern of the new labour dispensation. The court in *CCMA* (*supra*) stated that:

> "A right to legal representation exists for the benefit and protection of litigants. In this case the Law Society does not purport to be pursuing the interests of those who use the services of the CCMA. Indeed, there is not the slightest suggestion in its papers that the restriction on the right to legal representation causes hardship to or has operated to the prejudice of those affected by it …The sole concern of the Law Society in bringing this litigation is that the subrule denies work to its members. Nothing in the Constitution nor any decided cases suggests that lawyers have a right to received business. Where they receive business through the operation of the courts or other tribunals that is because their clients have a right to employ their services and not because they have a right to provide them."

This does not mean that parties are not entitled to be legally represented in incapacity and misconduct disputes, nor does it mean that legal representatives are themselves not entitled to appear at these proceedings. It simply means that, in order to be legally represented, the commissioner and the parties would need to consent, or the commissioner would need to conclude that it is unreasonable to expect a party to deal with the dispute without legal representation after considering the nature of the questions of law raised by the dispute, the complexity of the dispute, the public interest and the comparative ability of the parties or their representatives to deal with the dispute. And, according to the Supreme Court of Appeal, it is likely that the aforementioned factors include the seriousness of the consequence(s) of the dismissal. In other words, where the misconduct or incapacity of dispute is of such a nature that legal representation is warranted in the circumstances, there should be no reason why in such circumstances a party to the dispute should be prejudiced by not permitting him or her to be legally represented.

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