

THE Labour Chronicles

WHERE LABOUR MATTERS, MATTER!

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6 Critical Factors Employers Should Know When Appearing at the CCMA or Bargaining Council

One of the factors employers dread, particularly if you are a small or medium enterprise (SME), is when a former employee takes the company to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Bargaining Council. SMEs would rather consolidate their business efforts in growing their businesses rather than spend time and limited resources to defend labour related matters at the CCMA/Bargaining Council.

South Africa's workplace is highly regulated, and if the employer is to be dragged to the CCMA by a former employee, they better be prepared or they might count the losses. As a business enterprise if you do not handle your labour matters properly and in accordance with legislation and prescripts, you are certain to get the wrong end of the stick, as it were, at the CCMA/Bargaining Council.

Most employees if not all, will certainly refer a matter of unfair dismissal to the CCMA regardless of whether the employee believes that he/she has been unfairly dismissed or not, in other words, some will take their chances and hope that the employer will be found wanting, and I can assure you, some employers are found wanting.

The CCMA has reported that in 2015 it received a total of 171 854 referrals and this translates to 687 cases daily. They further reported that out of this number, 96, 4% relate to unfair dismissals. It would be helpful then to ensure that when you are taken to the CCMA, at least know the critical factors with regards to the preparation of the case, so that you are empowered to present a decent case. That been said, I have prepared what I think is critical to know when appearing at the CCMA to defend a dismissal of an employee.

Critical Factor #1 - The Notice:

Most of the time the first thing you will receive from the CCMA/Bargaining Council indicating that a matter has been referred, is a Notice to Attend, either a conciliation or a Con-Arb. In some instances the CCMA/Bargaining Council will give the parties (employee and employer) a ring to conduct what is referred to as a Pre-Conciliation.

Pre-Conciliation is a process in which the CCMA will attempt to resolve the matter telephonically or by other means before it can be scheduled for a much formal process of conciliation or arbitration. If Pre-Conciliation was unsuccessful, or rather, the parties did not manage to settle the matter, the CCMA will then send what is termed a notice to attend a Conciliation, Arbitration or Con-Arb. This notice to attend will be file by the CCMA in order to serve as proof that parties have received same in order to quell any disputes that may arise later regarding the receipt of the notice.

The purpose of the notice is as follows;

1. To inform the employer party that a referral has been made to the CCMA.
2. To advise the employer party of the nature of the dispute.
3. To inform the employer party of the relief sought and the grounds for the relief.
4. To inform the parties of the date, time and venue of the conciliation or arbitration.
5. To effectively enable the parties to timeously prepare for the CCMA process.

Critical Factor #2 – Representation:

In terms of Rule 25 of the CCMA, parties are not automatically permitted to be represented by a legal practitioner (attorney) in matters concerning dismissals related to misconduct and or incapacity, unless a party makes an application in terms of rule 25. Rule 25 is when a party at the CCMA wishes to be represented by an attorney or any other person, like a labour consultant. Basically the CCMA allows the parties to be represented by the trade union, in case of the employee, or employer organisations, in case of the employer. The following may represent a party in the dismissal cases;

- Official or office bearer of that party's registered trade union or employers' organisation;
- An employer party may be represented by an employee of such party;
- An employer party may be represented by a director of a company and or by a member of a close corporation.

However, if both parties consent to be represented by legal practitioners or labour consultants, the Commissioner may allow parties to be assisted in the proceedings in this regard. If there is no consent by parties, any party may bring an application to be represented by a legal practitioner, labour consultant or any third party for that matter, however, certain requirements needs to be met as per Rule 25 in conjunction with rule 35 of the CCMA.

Critical factor #3 – The Preliminary Issues:

Before the matter can proceed to a much formal process of arbitration, parties can bring preliminary issues to the attention of the Commissioner. Preliminary issues are any issues that a party thinks are necessary that the Commissioner should consider before commencing with the matter. These issues are factors like, the lateness of the referral by the employee, jurisdictional issues, etc.

The prescribed timeframe for the employee to refer a matter to the CCMA after he/she has been dismissed by the company, is 30 days. If the employee fails to refer the matter within this time period he/she will be obliged to file for condonation. Condonation means that an employee will have to apply and motivate why the CCMA should entertain he's/her claim which is late and is outside the prescribed time frame.

Critical Factor #4 – The Process:

With regards to cases of unfair dismissals, there are basically two processes, namely Conciliation and Arbitration, Con-Arb is when the two processes, Conciliation and Arbitration are combined into one process.

Conciliation:

Conciliation is when the Commissioner seeks to assist the parties in reaching a settlement without delving into the merits of the matter, in other words, the Commissioner facilitates a settlement agreement by allowing the parties to negotiate an agreement.

Arbitration:

If parties do not manage to reach a settlement, and depending on the kind of the notice they have received, the matter proceed immediately to Arbitration. If the notice indicates that the process to attend will be for conciliation only, or the employer has filed for an objection to oppose the Arbitration process to proceed immediately after Conciliation, the CCMA will schedule a new date by sending a notice to attend an Arbitration process.

Arbitration is much more formal and it is like a mini court, wherein the employer will have to prove that the dismissal of the employee was fair, and this is done by presenting evidence and calling witnesses if necessary.

Critical Factor #5 – Application for the Matter to be Dismissed:

In an instance where the referring party (in this case the employee) is not present at the Arbitration proceedings, you can bring an application that the matter be dismissed, in other words, be thrown out of the CCMA. The Commissioner will look into factors such as, whether the employee has been properly notified of the arbitration meeting, and if the Commissioner is satisfied that everything has been done properly, and that there is no request for a postponement by the employee (applicant), either the employee is sick and therefore cannot attend, the Commissioner may dismiss the matter.

Critical Factor #6 – The Decision:

After the matter has gone through the process of Arbitration, the Commissioner will adjourn the case to prepare his/her decision, this decision is known as the Arbitration Award. An Arbitration Award shall be sent to parties within 14 days after the conclusion of the arbitration process. The award will basically indicate whether the Applicant has been fairly or unfairly dismissed. The award may pronounce the following if the dismissal has been found to be procedurally and or substantively unfair;

- Compensation;
- Retrospective reinstatement;
- Re-employment

The award is binding to parties, however parties can take the matter on review by referring it to the Labour Court if either party maintains they still have grounds for the matter to be reviewed. Parties have 6 weeks after the receipt of the Arbitration Award to file for a review with the Labour Court.

Conclusion:

Although there are other things that I have not mentioned that take place when a matter has been referred to the CCMA, I think if you are familiar with these 6 critical factors, presenting your case at the CCMA/Bargaining Council will not be that hard to do. Keep these 6 critical factors in mind and you should be good at the CCMA.

Till next time, cheers!



About me:

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