IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 61197/11

In the matter between: 15/10/2012.

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

and

15/10/12
DATE

SIGNATURE

MINISTER OF LABOUR First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent

DIRECTOR FOR THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Fourth Respondent

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JUDGMENT

Tuchten J:

1 The applicant Law Society moves the court for a declaration that subrule 25(1)(c) of the rules of the third respondent ("the CCMA") is unconstitutional. The Minister of Justice and Constitutional

Development abides the decision of the court. The application is opposed by the remaining respondents, to whom I shall for convenience refer as the respondents.

2 The rules of the CCMA govern arbitrations conducted in terms of the Labour Relations Act, 66 of 1995 ("the LRA"). The rules were made by the CCMA pursuant to s 115(2A) of the LRA which confers upon the CCMA a wide competence to regulate the manner in which such arbitrations are conducted.[1]

3 Section 115(2A)(k) empowers the CCMA to regulate in its rules

> ... the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings.

4 Pursuant to that power, the CCMA enacted rule 25 which reads in relevant part:

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[1] The rules were published under Government Notice R1448 in Government Gazette 25515 of 10 October 2003 and amended from time to time thereafter.

(1) (a) In conciliation proceedings a party to the dispute may appear in person or be represented only by-

(1) a director or employee of that party and if a close corporation also a member thereof; or

(2) any member, office bearer or official of that party's registered trade union or registered employer's organisation.

(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.

(2) If the [*sic*] party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of this rule, the commissioner must determine the issue.

(3) The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of this Rule. [my emphasis]

5 Every attorney, notary and conveyancer in Gauteng, Mpumalanga, Limpopo and portions of North West Province is a member of the Law Society. The Law Society is empowered by statute and the common law to maintain 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. On these grounds, amongst others, the Law Society contends that it has standing to attack the constitutional validity of the impugned subrule.

6 In their answering affidavit, the respondents disputed the Law Society's claim of standing but no argument was addressed to me on this question and the case proceeded without any challenge to the Law Society's standing. This approach was a wise one. One of the grounds of attack was that the impugned subrule offends against the rights of members of the Law Society in relation to the free choice of

their profession as entrenched in s 22 of the Bill of Rights. I need not consider for this purpose whether s 22 is legitimately implicated in this case. At the level of jurisdiction, the question is not whether the applicant has made out a good case but what case, good or bad, the applicant has in fact made out.[2] That being so, the applicant may properly rely on the objective unconstitutionality of the measure for the relief sought, even though the right unconstitutionally infringed is not that of the applicant but of some other person.[3]

7 The CCMA is a statutory body established with effect from 1 January 1996 under s 112 of the LRA.[4] It plays an important, indeed vital, role in the resolution of disputes falling under the ambit of the LRA. It must attempt to resolve through conciliation, any dispute referred to it in terms of the LRA and, if a dispute referred to it remains unresolved, arbitrate such dispute if certain jurisdictional prerequisites are present.[5] The CCMA is independent of the State, any political party, employer or representative of any employer or employee.[6]

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2 *Makhanya v University of Zululand* 2010 1 SA 62 SCA para 34

3 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 CC para 29 and cases in fn 32 in that judgment

4 Section 112 of the LRA

5 Section 115 of the LRA

6 Section 113 of the LRA

8 The dispute resolution work of the CCMA is done through commissioners, who are appointed under s 117 of the LRA and must be "adequately qualified persons". The first step in a dispute referred to the CCMA is conciliation.[7] If that does not work within the periods contemplated, the commissioner must certify that fact in accordance with the procedure prescribed.[8]

9 Once conciliation has failed, the LRA provides for the dispute which was the subject of the conciliation proceedings to be resolved through arbitration before a commissioner appointed by the CCMA itself, again if certain jurisdictional prerequisites have been established.[9] There are fairly elaborate provisions for objection to the individual commissioner appointed to hear the arbitration. The parties are even given a say, if they want it, on their "stated preference" in the choice of commissioner.[10]

10 When a commissioner resolves a dispute by arbitration under the provisions of the LRA, he[11] is given wide powers akin to those afforded to litigants in a civil trial in a High Court. For example, he may

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7 Section 135(1) of the LRA

8 Section 135(5) of the LRA

9 Section 136(1) of the LRA

10 Sections 136(3) to 135(6) of the LRA

11 Or, as I shall say once and for all, she

subpoena potential witnesses, *duces tecum* if he so decides, including expert witnesses, and require witnesses to testify under oath or affirmation. In addition, he may after obtaining authorisation in the manner prescribed under the LRA, enter premises and seize writings and other things relevant to the resolution of the dispute and take statements from persons willing to make them about any matter relevant to the dispute.[12]

11 Persons subpoenaed by a commissioner and others, including those who appear in an arbitration in a representative capacity, may be punished for contempt of the CCMA, again pursuant to a fairly elaborate procedure.[13]

12 As I have shown, the powers of commissioners and the process under which arbitrations are conducted are strictly governed by law. However, in the conduct of the arbitration itself, the commissioner is empowered to conduct the arbitration in a manner which he considers appropriate in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities. He may even decide to dispense with oral

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[12] Sections 142(1) to (6) of the LRA

[13] Sections 142(8) to (12) of the LRA

evidence or cross-examination and concluding arguments.[14] But he must take into account any code of good practice issued by NEDLAC, the National Economic Development and Labour Council established under s 2 of the National Economic, Development and Labour Council Act, 35 of 1994 or any guidelines issued by the CCMA relevant to the case before him.[15]

13 As with civil disputes which come before a court, the parties to an arbitration before a commissioner may settle the matter. But if the arbitration proceeds, within 14 days of the conclusion of the arbitration proceedings (unless the Director of the CCMA ("the Director") extends this period), the commissioner must issue an arbitration award with brief reasons. The CCMA must then serve a copy of the award on each party to the dispute or the representative of each such party and file the original of that award with the registrar of the Labour Court.[16] A settlement may also be made an arbitration award.[17]

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[14] Section 138 of the LRA

[15] Section 138(6) of the LRA

[16] Section 138(7) of the LRA

[17] Section 142A of the LRA

14 An arbitration award is final and binding.[18] There is no appeal against an arbitration award but an award may be reviewed.[19]

15 An arbitration tribunal constituted under the LRA is not a court. A commissioner conducting a CCMA arbitration is performing an administrative function.[20] 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.[21] 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

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18 Section 143(1) of the LRA

19 Section 145(1) of the LRA

20 *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 2 SA 24 CC para 88

21 *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2002 5 SA 449 SCA para 11. See also *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* [2005] 2 All SA 479 SCA para 11.

proper construction, the provisions of the authorising statute are inconsistent with PAJA.[22]

16 The provisions of subrules 27(1)(b) and (c) were formerly contained within ss 140(1) and s 138(4) of the LRA. These subsections of the LRA were repealed in 2002[23] and, as I have already mentioned, re-enacted in 2003 within subrules 25(1)(b) and (c). Had the substance of the impugned subrule been contained within the LRA itself, there would have been room for the argument that the provision in the LRA was inconsistent with PAJA, with the consequence that there was no requirement that the LRA be read together with PAJA for present purposes. But because, as matters stand today, that is not the case, the result is that to achieve constitutional compliance, the impugned subrule must be consistent with both the LRA and PAJA.

17 Before I turn to the merits of the constitutional challenge, I must deal with three points *in limine* raised by the respondents, on appropriate notice to the Law Society. The first point is that to the extent that the

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22 *Zondi v MEC for Traditional and Local Government and Others* 2005 3 SA 589 CC para 101

23 Section 12 of Act 12 of 2002

challenge is based on unfair discrimination as proscribed by s 9 of the Bill of Rights, the case should have been brought in the Equality Court and not the High Court. The essential submission in this regard is that by enacting the Promotion of Equality and Prevention of Unfair Discrimination Act,[24] ("the Equality Act") the legislature deprived the High Courts, in favour of the Equality Court, of their jurisdiction to adjudicate constitutional challenges based on an alleged act of unfair discrimination. The thrust of the argument is that our law is clear that where legislation is enacted to give effect to a provision in the Constitution, a litigant may not rely on the Constitution directly but must bring its challenge under such legislation.

18 In my view, I am precluded by higher authority from even considering this point. In *Monong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Others (No 2)*,[25] it was held that a person who is victim of discrimination is not precluded by the Equality Act from bringing proceedings in the ordinary course in a High Court.. Counsel for the respondents submitted that the conclusion in *Monong* was arrived at *per incuriam* and that I am thus not bound by it. I am quite unable to agree. I shall however give brief reasons why I think the argument is unsound. In *Makhanya, supra*, at para 25 the SCA

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[24] Act 4 of 2000

[25] 2009 6 SA 589 SCA para 56. See also *Minister of Environmental Affairs and Tourism v George and Others* 2007 3 SA 589 SCA para 17.

held that the question whether one court rather than another has jurisdiction must be determined by an analysis of the relevant measures governing the position. From inception of our constitutional dispensation, the High Courts have in the main been the courts to which litigants have turned for constitutional protection, particularly in the case of a challenge to legislation or conduct alleged to be constitutionally uncompliant. Section 169 of the Constitution provides that a High Court may decide any constitutional matter except a matter reserved for the Constitutional Court or a matter

> assigned to another court of a status similar to a High Court.

19 Leaving aside the question whether an Equality Court is a court of a status similar to a High Court, in general or when its presiding officer is not a judge, the powers "assigned" to the Equality Court do not expressly include the determination of constitutional challenges. They do, however, include the powers to make orders similar to those within the competence of the High Court, including restraining conduct and awarding damages in relation to unfair discrimination, hate speech and harassment related to (I summarise) sex, gender, sexual orientation or membership of a group.[26]

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[26] Section 21(2) of the Equality Act

20 Constitutional challenges are frequently based on several sections of the Bill of Rights. It would be most 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, say, alleged infringements of the Bill of Rights in relation to children, education, language and culture and equality, had to be decided in two separate hearings. Legislation purporting to achieve that result might well fall foul of the protection of the right of access to justice under s 34 of the Bill of Rights. If the legislature wished to abridge the jurisdiction of the High Courts in so singular a manner, I would expect it to have done so in the clearest of language. Absent such clarity of expression, there is thus, in my view, no basis for concluding that the wide powers of constitutional scrutiny vested in the High Court by s 169 have in any way been abridged by the enactment of the Equality Act.

21 In the alternative, counsel for the respondents submitted that the High Courts have concurrent jurisdiction with the Equality Courts to determine such challenges and that in the exercise of my discretion, I should decline jurisdiction in favour of the Equality Court. Assuming, against my finding, that this concurrency exists at the level of discretion, I must firmly decline the invitation. Firstly, no such argument was made in the papers so the Law Society has not had an opportunity to deal with the question at a factual level. Secondly, the

present challenge was launched by notice of motion bearing the stamp of the registrar of 28 October 2011, ie almost a year ago. The merits of the matter were fully argued before me. The procedure in the Equality Court requires an "inquiry" which would take considerable time to complete. Thirdly, there is no good reason to vitiate the alleged choice of forum made by the Law Society in favour of the High Court. Where a litigant has chosen in good faith one of two or more available forums for its constitutional challenge, such choice should wherever possible be respected. Fourthly, as a matter of policy, the High Courts should, in my view, jealously guard their preeminent 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 plainly been 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. There is no reason why an Equality Court, even manned as it must be by a presiding officer steeped in the inwardnesses of matters relating to social context and applicable uniform norms, standards and procedures, should be better placed to decide this case. And fifthly, I myself have received the training contemplated by the Equality Act.[27] The first point *in limine* must therefore fail.

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[27] Section 31(4) of the Equality Act

22 The second and third points *in limine* may be discussed together. Essentially the argument is that the impugned subrule is permitted by s 115(2A)(k) of the LRA read together with s 3(3) of PAJA. In my view, these are really arguments which go to the heart of the dispute on the merits and I shall deal with this question when I discuss the merits of the challenge, as I shall now proceed to do.

23 One of the Law Society's grounds of attack is an absence of rationality in the impugned subrule. It will be observed that in all arbitrations which come before a commissioner except matters relating to the employee's conduct or capacity, the litigants have an unrestricted right under rule 25(2)(b) to appear in person or be represented by a legal practitioner, a director, employee or, in the case of close corporations, a member of that litigant or a member, office bearer or official of the litigant's registered trade union or employer's association. But in matters relating to the employee's conduct or capacity, rule 25(2)(c), ie the impugned subrule, applies. In the argument before me, "matters relating to the employee's conduct" were equated to arbitrations arising from dismissals of employees for misconduct.

24 Rule 25(2)(c) restricts the right to representation. It does so by excluding legal practitioners, as defined in the LRA,[28] from appearance as of right unless the nature of the case, presumably as evaluated before the case begins, is such as to persuade the commissioner that the appearance of a legal practitioner is warranted or all parties and the commissioner consents to the appearance of the legal practitioner. But the impugned subrule does not affect the right conferred in rule 25(2)(b) in relation to the other categories of representative. Only legal practitioners as defined are hit by the impugned subrule.

25 In paragraph 28 of its founding affidavit the Law Society attacked the distinction drawn as follows:

> There appears to be no reasonable or constitutional rationale why only practising legal practitioners have a qualified right to appear in dismissal disputes involving conduct or capacity.

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[28] The reference to legal practitioners in rule 25 is in fact to those lawyers admitted to practise as an advocate or attorney in the Republic. Section 213 of the LRA. This would include admitted advocates and attorneys who are not practising as such. In this regard, I respectfully agree with the minority judgment of Musi JA in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others* 4 BLLR 299 LAC para 26. So a legal practitioner whose name was removed, or even struck, from the roll and who otherwise qualified to appear at a CCMA arbitration would have to be allowed to do so.

26 The fundamental principle, deriving from the rule of law itself, is that the exercise of public power at every level is only legitimate when lawful. This tenet of constitutional law admits of no exception and has become known as the principle of legality. The principle of legality requires, amongst other things, that conduct in the exercise of public power must not be arbitrary or irrational.[29] The rules of the CCMA themselves, the framing of which is itself an example of an administrative decision,[30] must be rational.

27 This does not mean that a rule, or any other administrative decision, may be set aside for irrationality if it is shown that the decision is not perfect in conception or execution or its purpose could have been better achieved in another way. It is only when the decision is such that no reasonable person could have taken it that it will be set aside on this ground. The best way to determine whether or not a decision

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29 *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* [2012] ZASCA 115 para 21; *Democratic Alliance v Ethekwini Municipality* 2012 2 SA 151 SCA para 21 and cases referred to in that paragraph; *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24 paras 29-32

30 *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another As Amici Curiae)* 2006 2 SA 311 CC para 135

is rational is to examine it in the light of the reasons advanced to justify the decision.[31]

28 What are the reasons for the exclusion? I have the benefit of a great deal of compelling evidence from the Director herself, from Winifred Everett, who is a seasoned senior commissioner, and from Ian Macun, a sociologist. The thrust of this evidence is that the system within which the CCMA functions is the product of a very particular social and legal context, negotiated by a variety of social partners. The restrictions on legal representation are part of this context and the product of these negotiations. The negotiating parties agreed that arbitration litigants should enjoy an unqualified right to legal representation in all arbitrations other than those concerning dismissals for misconduct or incapacity. The Director says in her affidavit that it is inherent in the structure of the adjudication of disputes by the CCMA that

> ... 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.

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31 *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* [2012] ZASCA 115 para 44

29 The unchallenged and cogent evidence placed before me by the respondents is that the system of workplace arbitration works in manner acceptable to the social partners, with their wide range of sometimes disparate interests, who negotiated the system. I was properly cautioned in argument against the error of trying to fix that which is not broken.

30 The views of the CCMA and its Director, representing as they do the democratically approved specialist response to the challenge of resolving workplace disputes, must be accorded substantial weight and be treated by a High Court, which lacks the specialist expertise of the Labour Court, with a degree of deference. 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. And 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.

31 There is a thread that runs through the evidence placed before me by the CCMA: that the presence of lawyers within the arbitration process will, more often than not, lead to obfuscation, unnecessary complication of the issues and time wasting. I have no doubt that in specific arbitrations, all these evils will occur. They occur in court cases as well. The solution devised for the courts is to try to staff courts with presiding officers who can recognise, and deal appropriately with, such conduct.

32 The other side of the coin, however, certainly in the vast majority of court cases, is that lawyers contribute to the efficient and speedy resolution of disputes by agreeing matters which are not genuinely in dispute and limiting evidence, cross-examination and argument to that which is necessary for the adjudication of the case. There is no reason why that should not be so in CCMA arbitrations as well. That some evidence or cross-examination is ultimately inconclusive is an inevitable consequence of the constitutional imperative[32] that disputes which can be resolved by the application of law must be decided in a

[32] Section 34 of the Bill of Rights

fair hearing and a legal system which allows evidence, cross-examination and argument as a means to achieve fairness.

33 The evidence shows that arbitrations about the fairness of dismissals on the ground of misconduct account for about 80% of the total of the arbitrations that come before the commissioners of the CCMA and those for incapacity a further small percentage. The balance of the arbitrations relate, amongst others, to constructive dismissals (ie misconduct or the use of unfair labour practices by the employer) and, I was told during argument, unfair labour practices outside the ambit of dismissals, failures to promote employees, victimisation and retrenchment. In addition, as the rule stands at present, litigants are entitled to legal representation as of right in all applications for rescission of awards[33] and condonation for non-compliance with time frames provided for in the rules.[34]

34 It is in my view a fair conclusion that the several negotiating parties who participated in the deliberations that led to the enactment of the LRA came to a compromise solution in relation to legal representation at arbitrations which found its way into the now repealed ss 138(4) and 140(1) of the LRA and ultimately into subrules 25(1)(b) and (c).

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[33] Section 144 of the LRA

[34] Rule 35

I am mindful of the subtle balances that must inevitably be present in our system of workplace dispute regulation. But of course any such balances which are translated into legislation or administrative action must pass constitutional muster. An administrator as that term is used in PAJA has a discretion under s 3(3)(a) to give a person whose rights are materially and adversely affected by administrative action an opportunity to obtain legal representation both in serious and in complex cases.

35 In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others* 4 BLLR 299 LAC, Musi JA found that s 141(1) of the LRA was rational. He held that the admitted seriousness of arbitrations concerning dismissals for misconduct did not of itself justify legal representation.[35] The learned judge was dealing with a situation in which the provisions of s 3(3)(a) of PAJA (which I shall quote below) found no application because the LRA expressly dealt with the question of legal representation and therefore ousted s 3(3)(a) of PAJA.

36 Musi JA further found the distinction between the absolute right of legal representation in CCMA arbitrations other than dismissals for misconduct or incapacity and the discretionary right afforded where an

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[35] Para 29 of the judgment of Musi JA

the fairness of such a dismissal was in issue to be justified.[36] The learned judge of appeal found that a commissioner could routinely determine before the arbitration started whether legal representation was appropriate. I respectfully disagree. It fairly frequently happens that a case which appears before it starts to be straightforward turns out to be complex. The learned judge further concluded that it was rational to make the distinction because dismissals based on misconduct and incapacity constitute by far the bulk of the disputes arbitrated by the CCMA.[37] Again, I respectfully disagree. To identify one category of case *a priori* (by reasoning from assumed axioms) for different treatment irrespective of the merits of each individual case seems to me the essence of arbitrariness.

37 And finally, much of the reasoning of Musi JA is founded on the fact that s 141(1), the measure which the learned judge was examining, was national legislation. The effect of this, as I touched upon above, was that the provisions of s 3(3)(a) of PAJA were not required in that context to be observed. That alone in my view distinguishes *Netherburn* from the present enquiry.

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[36] Para 37 of the judgment of Musi JA

[37] Para 41 of the judgment of Musi JA

38 In my view rule 25(1)(c) is not consistent with s 3(3)(a) of PAJA, which reads in relevant part:

> 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)[38] an opportunity to-
> (a) obtain assistance and, in serious **or** complex cases, legal representation ... . [my emphasis]

39 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.

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[38] ie a person whose rights or legitimate expectations are materially and adversely affected by administrative action

40 The respondents complain that a change to the current regime which permits legal representation might significantly add to the work load of the CCMA and thus impair its ability to perform its core functions. As a matter of principle, I do not think I should take this into account. As was held in *Sidumo, supra*, para 77:

> 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.

41 I do not think that the respondents have succeeded in establishing that the limitation of the right to legal representation imposed under the impugned subrule is reasonable and justifiable.[39] I say this because the limitation is arbitrary.

42 My finding that the impugned subrule is arbitrary means that I do not have to consider the other grounds of attack raised by the Law Society.

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[39] Section 36 of the Bill of RIghts

43 It follows that a declaration of constitutional invalidity must issue. This conclusion does not mean that the rules of the CCMA must provide for an unrestricted right to legal representation. On the contrary, both the common law as expressed in *Hamata, supra*, and s 3(3)(a) of PAJA confer a discretion on a commissioner in a CCMA arbitration. I further express no opinion whether a litigant in such an arbitration should receive legal aid.

44 The parties were agreed that the declaration should be suspended for a period of 36 months to enable the relevant parties to consider and promulgate a new subrule and that there should be no order as to costs.

45 I accordingly make the following order:

1 Rule 25(1)(c) of the Rules of the Commission for Conciliation, Mediation and Arbitration is declared to be inconsistent with the Constitution and invalid;

2 This declaration of invalidity is suspended for a period of 36 months to enable the relevant parties to consider and promulgate a new subrule;

3 There will be no order as to costs.

NB Tuchten
Judge of the High Court
11 October 2012

For the applicant:
Adv G Rautenbach SC
instructed by Rooth Wessels Inc
Pretoria

For the first respondent:
Adv G Marcus SC and Adv ZZ Matebese
instructed by Bowman Gilfillan
Johannesburg

For the third and fourth respondents:
Adv G Marcus SC and Adv N Rajab-Budlender
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Johannesburg