



WHAT IS ARBITRATION?

Arbitration is a more formal process than conciliation. Arbitration differs from conciliation in that it does not promote the continuation of collective bargaining and negotiations. The commissioner listens and investigates the demands and counter demands of both parties and decides on a final settlement in a form an arbitration award. The award is then imposed on the parties after hearing the evidence. This is legally binding on both parties.

S138 of the Labour Relations Act stipulates that the commissioner can use his discretion as to the manner in which he/she would like to conduct the hearing.

The commissioner must deal with the substantive merits of the dispute with a minimum of legal formalities.

A party to the dispute may give evidence, call witnesses, question the witness of any other party and address concluding arguments to the commissioner.

POSTPONEMENTS

Postponements of arbitration hearings are costly. They are only granted where there is compliance with CCMA rule 23 where:

- Both parties to the dispute agree in writing to the postponement; and
- The request is received by the CCMA 10 days prior to the hearing.
- By applying in terms of rule 31 to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the Commission before the scheduled date of the arbitration.
- The commissioner will decide whether to grant the request without convening a hearing for a postponement or whether to convene a formal hearing.

REPRESENTATION AT ARBITRATION

In terms of s138 (4), as contained in the transitional provisions (schedule 7 item 27) a party to the dispute may appear in person or be represented only by:

- A legal practitioner;
- A director or employee of the party; or

- Any member, office-bearer or official of that party's registered trade union or registered employer's organisation.

In cases where the dispute being arbitrated, relates to conduct or capacity, in terms of s140 (1) as contained in the transitional provisions (schedule 7 item 27) - the parties are not entitled to be represented by a legal practitioner in the arbitration proceedings unless:

The commissioner and all other parties' consent or the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering the following:

- The nature of the questions of law raised by the dispute;
- The complexity of the dispute;
- The matter concerns the public interest; and
- The comparative ability of the opposing parties or representatives to deal with the arbitration of the dispute.

NOTE: an advocate may only represent a party in a CCMA hearing if briefed by a firm of attorneys.

Failure to attend the hearing might lead to the commissioner dismissing the case.

PRE-ARBITRATION CONFERENCE

By agreement between the parties or when so directed by the Director the parties to the proceedings must hold a pre-arbitration conference to:

- Determine the facts in dispute, common cause facts, issues to be decided, and relief claimed.
 - Exchange documents that will be used in the arbitration
 - Draw-up and sign a minute of the pre-arbitration conference.
- See rule 20, for more information.

WHAT HAPPENS AT ARBITRATION

- It is important for the parties to prepare the evidence to be presented at the hearing before the time;
- Ensure that the submissions they want to make are clear and concise;
- Prepare whichever witnesses will be needed to support your case and make sure they are available for the hearing;

- Parties should also be open to conciliation during the arbitration and be prepared to settle; and
- The onus will be on the applicant to establish the existence of a dismissal.

OUTCOME OF THE ARBITRATION

An arbitration award must be issued within fourteen (14) days of the award. If any good cause can be shown the CCMA Director may extend this period.

The arbitration award usually covers the following:

- Details of hearing and representation
- Issue to be decided
- Background to the issue
- Survey of evidence and argument
- Analysis of evidence and argument

FAILURE TO COMPLY WITH THE AWARD

An arbitration award for compensation issued by a commissioner is final and binding and can be enforced by the CCMA Director. In other words, the CCMA has the necessary powers to make an arbitration award an "order of court" hence; parties do not have to refer the award to the Labour Court for enforcement. The applicant would then be required to complete a 7.18 form. The director must certify the award as an order of court. Then it must be taken to the Registrar of the Labour Court to issue a writ and from there to the Sheriff to execute.

In the case of awards by the bargaining council, the applicant would be required to complete form 7.18A and follow the same procedures as above.

For the enforcement of any other certified award (i.e. which does not involve the payment of money) the applicant may institute contempt proceedings in the Labour Court once the award has been certified.

The certification of awards is designed to expedite the enforcement of the obligations arising from the award. It remains possible, however, that a party to an award, which has not been certified, may still approach the Labour Court to have the award made an Order of Court in terms of section 158(1) © of the LRA

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RELEVANT LEGISLATION

CCMA Rules 23,31 and 20
Labour Relations Act 1995, as amended s136-145