

SA Labour Guide

Case law updates for 2017

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**GENERAL, DOMESTIC & PROFESSIONAL
EMPLOYERS ORGANISATION**

What will we discuss today?

- Incapacity
 - *Exxaro Coal v Maduma 2017*
 - *Parmalat v CCMA 2017*
 - *FNB v CCMA 2017*
- Automatic termination clauses
 - *Nogcansti v Mnquma Local Municipality*
- CCMA Representation
 - *Casual Worker's Advice Office V CCMA cases*
 - Rule 25 amendments

Exxaro Coal v Maduma (2017) ILJ 2531 (LC)

- **Process controller** at Groot Geluk mine
- **Ill-health**
- Lung disease - not work in a dusty area
- Doctors - *light duty*
- Incapacity procedures followed, **no alternative positions**
- CCMA - substantively and procedurally unfair -
 - No conclusive medical investigation to determine the extent of his incapacity
 - Failure to offer suitable alternative post at mine (*Whaaaaaaattttt????*)
 - **Reinstatement AND 13 months' remuneration**, - alternative post available (team assistant) / procedure flawed

Schedule 8 Code of Good Practice: Dismissals for Incapacity

- Ill health or injury
 - (1)
 - temporary or permanent.;
 - investigate the extent of the incapacity;
 - unreasonably long, the employer should investigate all the possible alternatives short of dismissal.

(temporary - consider, nature of the job, length of absence, the seriousness of the illness and temporary replacement)

(permanent- possibility of securing alternative employment, or adapting the duties)

- (3)
 - degree and cause of incapacity relevant
- (4)
 - injured at work / work-related illness. Duty on the employer to accommodate the incapacity of the employee is more onerous

- Item 11
- Dismissal un/fair??? consider-
 - (b) if the employee is **not** capable-
 - (i) the **extent** to which the employee **is able** to work;
 - (ii) the extent to which the employee's **work circumstances** might be **adapted to accommodate work**, or, if not possible, the extent to which the **employee's duties might be adapted**; and
 - (iii) *the availability of **any** suitable alternative work*
(Very NB)

- Review to LC- (naturally it would be...)
 - **arbitrator's decision** placing Maduma in a team assistant position was a suitable alternative to dismissal - **unreasonable**
 - unable to perform his **existing occupation**...
irresponsible for employer - another occupation...
still have been exposed to dust
 - But - Only vacancies at Groot Geluk - risk of dust exposure... **and none** of the jobs were entirely **desk bound**

- **But more should have been done** - determine permanent nature before continuing with the incapacity meetings

Judge held:

- The incapacity proceedings **less than thorough**;
- When e/er realised permanent / could not perform own duties, thought that that was the end of enquiry;
- Made no effort to explore possible vacancies **within the Exarro group** / outside a particular business unit,
- Should've explored **vacancies in other units** which were **office-based** not in a dusty environment;
- Finalised medical reports / assistance with disability benefits

–9 months compensation

- **Moral of the story?**

But what happens when an offer of *suitable alternative employment* is made?

- *Parmalat SA v CCMA (2017) 38 ILJ 2586 (LC)*

Why relevant?

- Demotion
- Employee unwilling. HE regards as inferior to existing position
- **Suitable???** - item 11(3)(iii) **requires** an employer to **consider the availability of suitable alternative work**
- **In the end...** dismissal for incapacity was procedurally unfair
 - (if alternatives were contemplated, were not canvassed with the employee during hearing, nor were they put to him before the decision was made to dismiss him)

Is it a bird?? Is it a plane???

Noooooooooo... it's...

- **Reason** for the employee's dismissal falls "between the cracks" could be **either** the employee's capacity to perform the job, or it may relate to the employer's operational requirements? **Route??**
- Not only employers get the **correct classification** for a dismissal wrong; but CCMA Commissioners have on occasion too

- Employee **no longer** perform duties assigned - does **not possess** the necessary **minimum requirements** to perform his job?
- **Courier company** driver must possess a valid driver's license.
- If lose his driver's license because of **reckless and negligent driving**?
- **Retrench** or **incapacity**?
- What is evident is that the employee can no longer perform his job because he does **not have a certain qualification, skill or minimum legal standard required by law** to perform his job.

- *Armaments Corporation of South Africa (SOC) Ltd (ARMSCOR) v CCMA and Others (JR1961/13; JR1510/13 (2016)*
- *“refused all grades of security clearance, contract of employment is terminated with immediate effect.”*
- Commish decides dismissal substantively unfair – because = operational requirements
- ARMSCOR review to LC
 - *Samancor Tubatse Ferrochrome v MEIBC & others [2010] 8 BLLR 824 (LAC)* what is incapacity???
 - *“Incapacity may include imprisonment..., so is one that results from a legal prohibition on employment.”*

- **Whitcher J**, decides otherwise... **is incapacity...** but **procedurally unfair** - Joubert was not afforded the opportunity to state his case at an **incapacity investigation**
- **However do consider... 31 years service** - retrenchment route, have to pay him for those years of service as a result.
- Will employers utilise incapacity procedures to terminate an employees' service in order to escape the liability associated with dismissals as a result of retrenchment??

Fast forward to 2017...

- *First National Bank, A Division of First Rand Bank Ltd V CCMA and Others (as yet an unreported judgment, case no J1476/2016, delivered on 10 July 2017*
- Employee appointed - Sales Consultant during **2011**.
- needs to be an **accredited** Financial and Intermediary Services ("FAIS") representative as defined under FAIS Act / **"fit and proper"**
- Pass the regulatory examinations set by FSB

- If the employee did not succeed in passing these exams he would **not be** able to **comply with the minimum standard under the FAIS Act**
- Mean that FNB **not lawfully employ** the employee to render financial advice as a Sales Consultant / he would not be able to sell FNB's products
- 15 times (2004 and 2015) (Guidance , Training, Evaluation, Support offered)

- FNB was **unable to accommodate** the employee in an **alternative position, although** they did consider one during December 2015
- **Incapacity enquiry.** Finding that the employee **lacked the necessary legal qualification to render a “fit and proper” service** to advise clients on FNB products
- FNB then terminated the employee’s service as a result

- Commissioner = dismissal was based on FNB's operational requirements and **NOT** incapacity
- FNB had not dismissed the employee substantively nor procedurally fairly
- **Review...** FNB argued the **Commissioner** had made an **two errors** when he said:
 - *"a dismissal, resulting from a legally imposed requirement for the job and a supervening impossibility to perform, **cannot be construed as an issue of incapacity**"; and,*
 - *"the dismissal ought to have been for **operational requirements**"*

- Judge said:
 - Line between **operational requirements** and **incapacity** should be drawn:-

*... where the employer determines or acknowledges the need to **restructure** its business **and not** where the employer cannot employ an employee because of a **statutory provision prohibiting such employment**.*

- *Further...*

- *In the event of incapacity, the **focus** is on the **qualities of the employee**. In the event of **operational requirements**, the **focus** is on the employer and its decisions relating to its business*

- Advice to employers:
 - do not be tempted to cloak a dismissal in incapacity terms when it is clearly one of retrenchment or misconduct.
 - The true reason for the dismissal must relate to either the conduct or capacity of an employee, or the result of a need to restructure a business because of financial, technical or similar needs; and a **fair procedure must be instituted**
 - **(ALWAYS / ??????)**

However... what about contracts with clauses that **automatically terminate employment???**

- *Nogcantsi v Mngquma Local Municipality and Others* (2017) 38 ILJ 595 (LAC)
- VIP services - contract appointment “subject to [a] **vetting and screening process**”... “should the revealed outcomes become **negative** your contract will be automatically terminate”
- Outcome of the screening process - negative information, notified of the termination of employment contract
 - Applicant had the following cases pending (SAPS - *Defeating the ends of justice, Interfering with the police while on duty, Attempted murder x 3, GBH - dismissed from SAPS*)

- The **CCMA** found that his employment had automatically terminated and that there was accordingly **no dismissal**.
- The Labour Court upheld this finding, and the appellant appealed to the **LAC**

- LAC: it was the **negative information** that caused the **(suspensive)** condition to be fulfilled and that ended the employment relationship (rather than any deliberate / intentional act by the employer).
- “[T]here was **no dismissal** – since the **automatic termination was not caused by any decision or act of the municipality or SAPS**
- *The appellant - onus to prove a dismissal on a balance of probabilities, and failed to discharge that burden.”*
- **Suspensive conditions** okay then(Yaaaayyyyyy!!)

CCMA representation – rule 25’s history

- **Memory** lane...
- **1995** - LRA (CCMA D/R body - speedily /expedite)
 - Objectives of LRA - purpose (social justice)
 - Minimum legal formality / procedures
 - Limit Legal representation to misconduct / incapacity
- **1996** (bear with me...) - Final Constitution
 - S23(1) “everyone... fair labour practice”
 - S33 Fair administrative action

• **2013** - SCA decision in *CCMA v Law Society for the Northern Provinces*

- no LR at Conciliation and Only in arbitrations regarding misconduct or incapacity -
- all parties AND Commish agree

• **2015** - Rule 25 (amended)- Who can /can't represent and when (conciliations v arbitrations)

- What is a legal practitioner?
- Rule 25 (5) proof

Application for or objection to legal representation?

- Application to the Commish
 - Nature of **questions** in law / facts of the case
 - **Complexity** of the dispute / simple enough to discharge?
 - Is case in **public interest**?
 - Comparative **ability** of reps
and
 - **Prejudice** to either party (will only serve to delay process?)
- Commish **may also** consider
 - Is it unreasonable?

(May want to consider these for **internal hearings** too)

- Enter **2016** - Casual Workers Advice Office press release (April 2016) taking CCMA to court
- Interest groups CWAO, Black Sash, Mofokeng Advice Resource Centre and **Ntombi Dladla (70 + 200)** represent vulnerable workers - **why they involved?**
 - Rule 25 unconstitutional
 - 70% unrepresented (StatsSA)
 - Groups of applicants - practicality (what happened in the CCMA case?)
 - Prevents speedy justice - Justice delayed...

- **20 September 2016** Van Niekerk J, in *CWAO & Others v CCMA & Others (J645/16)* ruled:
 - Commish discretion to authorise **any** party to **represent** at the CCMA on **good cause shown**
 - **Rule 25** read together **with Rule 35(1) (new rules)**
 - Gave CCMA **10 days** to issue practice note
- Practice note issued adding new **Rule 35(2)** – Commish may act in **any** manner that is expedient to achieve objectives of LRA – **substance rather than form** – expanded discretion
- **Effect?** Community advice office / legal aid etc. can now represent at the CCMA

- **Wait, wait, wait...** before everyone panics...
not an automatic right to LR by relatives,
friends, church pastors, film stars...
- Representation i.t.o practice note **must satisfy**
the following requirements:
 - Must be on **notice** i.t.o Rule 31 (at the time the
matter is set down) with **affidavit**;
 - Nature of questions in law / facts;
 - Complexity of the case;
 - Comparative ability of the parties;
 - Public interest;
 - Prejudice

- BUT also...
 - Representatives must be **registered NPO / Community Advice Office** - cannot be relatives, friends, church pastors, film stars;
 - Ability of the proposed representative (experience at CCMA, LL qualifications);
 - Representatives must have *locus standi* at the CCMA, cannot be labour consultants for e.g.;
 - Must show **good cause**;

- Must show why the Applicant **could not access** Legal Practitioners or T.U.(affordability, S198 TEE e/ees);
- Is representative subject to **disciplinary action** or falls within a **professional body's** Constitution;
- Will assist with the speedy resolution of the case;
- Show the representative assists vulnerable Applicants to access legal advice where **ordinarily would not be able to access**

- Commish must determine the issue and provide a written ruling **10 days** after the application for rep, and;
- Must be signed off by Senior Commissioner for Arbitrations before served on the parties after the ruling

BUT - Snyman, J???

- *Danone SA and others (JR2177/16) [30 June 2017]*
- Contradicts Van Niekerk regarding Rule 25...
- CCMA updated directive to Commissioners after this
 - **Original** Van Niekerk **judgment supported** and upheld by CCMA as being the correct judgment in law
 - CCMA creator of its own rules and therefore the Snyman judgment does not undo the current position

Many thanks...

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