

NOTE

AMENDMENTS TO THE CCMA RULES: THOUGHTS ON THE GOOD, BAD AND THE CURIOUS

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‘The Rules remain the servant, not the master, of expeditious resolution of labour disputes and provide an essential framework for users of the CCMA.’¹

1 INTRODUCTION

The Commission for Conciliation, Mediation and Arbitration (CCMA) continues to play a pivotal role in labour law in South Africa. During the financial year 2017–2018, the CCMA received a staggering 186 902 referrals.² This converts to an average of 754 new cases lodged every working day.³ In fulfilling its mandate to provide expeditious, informal and accessible specialised dispute resolution services,⁴ it is expected that the workload of this one-stop shop will see a significant increase in the years to come.

This contribution appears shortly after the enactment of amendments to the Basic Conditions of Employment Act⁵ (BCEA) and the Labour Relations Act⁶ (LRA), as well as the phased introduction of the historic

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¹ Peter Kantor *CCMA: A Commentary on the Rules* (Siber Ink 2001) 1.

² CCMA Annual Report 2017–2018 19 <http://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports>, accessed 14 December 2018.

³ *ibid* para 1.1.

⁴ André van Niekerk & Nicola Smit *Law@work* (LexisNexis 2018) 471.

⁵ Act 75 of 1997. The BCEA was amended by two amendment Acts on 27 November 2018. Firstly, the Basic Conditions of Employment Amendment Act 7 of 2018 was promulgated, among other things, to establish the Employment Conditions Commission; to extend the jurisdiction of the CCMA; and to extend the provisions for the enforcement of the labour inspectors to include enforcement of the National Minimum Wage Act 9 of 2018. Secondly, the Labour Laws Amendment Act 10 of 2018 was enacted to provide a minimum of 10 days’ parental and adoption leave to employees. See Asheelia Behari ‘The effect of the Labour Laws Amendment Bill 2017 on shared parental responsibilities’ (2018) 39 *ILJ* 2148 for a discussion on the last mentioned Act.

⁶ Act 66 of 1995. The Labour Relations Amendment Act 8 of 2018 provides, among other things, for the regulation of pickets by collective agreement or by determination by the CCMA in terms of picketing regulations; the extension of the meaning of ballot to include secret voting in the context of strikes; and an advisory arbitration panel and advisory arbitration awards.

National Minimum Wage Act⁷ (NMWA). All of these legislative measures came into effect on 1 January 2019. In a timely development, amendments to the Rules for the Conduct of Proceedings before the CCMA⁸ (CCMA rules) have also been published that came into effect on the same day.

The latest amendments leave most of the CCMA rules intact in their present form. The amendments aim to weed out past problems, to align the CCMA rules with the latest amendments to labour legislation, and to streamline and expedite CCMA processes. The aim of this contribution is to analyse most, but not all, of the significant amendments and to assess where the drafters of the amendments were on target and where they missed opportunities to improve the functioning of the CCMA.

2 SERVING AND FILING OF DOCUMENTS (RULES 1-9)

Rule 1, dealing with how to contact the commission, remains largely unchanged. It states that ‘documents may only be filed with the CCMA at the addresses, telefax numbers and e-mail addresses listed in Schedule One’. However, rule 1(2) has been amended to provide that documents may only be filed with the CCMA subject to rule 7. This rule explains through which means filing may be done and this aspect is discussed in detail below.

Rule 2 that deals with when the offices of the CCMA are open has also been slightly amended. The rule confirms that the ‘head office and regional offices’ of the CCMA will be open every Monday to Friday, excluding public holidays, between 08h30 and 16h30.⁹ Documents may be filed during these hours, but also ‘at any time’ of the day in terms of rule 2(3). However, this has been further amended by the words ‘and on any day of the week’.

This amendment reflects the fast-paced consumer type of environment that legal practice has become. In terms of the rule, documents may now be faxed and emailed to the CCMA over weekends. This measure is simply for the convenience of the parties. Even though this clarification is welcome, this does not imply that CCMA officials will henceforth be on duty on Saturdays and Sundays to attend to incoming mail. This

⁷ Act 9 of 2018. On 27 November 2018, President Ramaphosa signed the NMWA, as well as the above mentioned amendments into law. This was a significant moment for workers. While certain vulnerable employees in sectors such as farming, hospitality and domestic work have been covered by sectoral determinations, this is the first time a universal minimum wage has been established for South Africa. The national minimum wage is currently pegged at R20 per hour. Farm workers will gradually be increased from the current R18 per hour, and domestic workers from R15 per hour, to the national minimum wage.

⁸ GenN 776 GG 42092 of 7 December 2018.

⁹ Peter Kantor *CCMA: A Commentary on the Rules* 4 ed (Siber Ink 2015) 6 confirms that a fax or email is received ‘when the last page of the complete document or message [has been] received on the CCMA’s information system’. Rule 6 provides for proof of service by parties.

amendment will accordingly not lead to the speedier resolution of disputes.

Rule 3 that concerns how to calculate time periods¹⁰ has remained the same, apart from the addition of a footnote added to the text of rule 3(2). It states:

‘This Rule is not applicable to timelines regulated by the Labour Relations Act, Employment Equity Act and/or the Basic Conditions of Employment Act and/or the National Minimum Wage Act, which timelines shall be governed by the provisions of the relevant legislation, alternatively, the Interpretation Act.’

This is an important amplification. It is not in the best interests of justice to have proceedings before the CCMA negated on aspects like the incorrect interpretation of time periods. In line with the ideal of speedy dispute resolution before the CCMA, this should assist in avoiding confusion where specific time periods have been legislated or prescribed. So, for example, the Employment Equity Act¹¹ directs that disputes about unfair discrimination should be referred within six months.

Rule 4 relating to who must sign documents remains unchanged. Only the party personally, or his or her representative, may sign CCMA documentation.¹² The CCMA has no jurisdiction if dispute referral documents are not signed.¹³ Legal representation is regulated in terms of rule 25 and is discussed in detail below. Suffice it to say, a new feature is that candidate attorneys are now allowed to represent parties at arbitration, subject to the old provisos. This entails that candidate attorneys may now also sign dispute referrals and requests for arbitration.¹⁴

Rule 5, dealing with how to serve documents on other parties, sets out on whom documents may be served. The rule provides that a copy of documents must be served on the person concerned or an authorised representative or a person in charge of the person’s premises who appears to be above 16 years of age.¹⁵ Documents may also be served on a company, employer, trade union or employer’s organisation amongst others.¹⁶ A curious feature of rule 5(2)(g), which may have

¹⁰ Rule 3 provides that:

‘(1) For the purpose of calculating any period of time in terms of these Rules —

(a) day means a calendar day; and

(b) the first day is excluded and the last day is included, subject to subrule (2).

(2) The last day of any period must be excluded if it falls on a Saturday, Sunday, public holiday or on a day during the period between 16 December to 7 January.’

¹¹ s 10(2) of the Employment Equity Act 55 of 1998.

¹² Kantor n 9 above 9 states that a person in possession of a power of attorney, including a legal representative in terms of their legal mandate, may sign documents on behalf of applicants.

¹³ *Oosthuizen v Imperial Logistics CC & others* (2013) 34 ILJ 683 (LC).

¹⁴ See *ABC Telesales v Pasmans* (2001) 22 ILJ 624 (LAC) where the Labour Appeal Court found that the referral signed by a candidate attorney was not defective.

¹⁵ rule 5(1)(a).

¹⁶ rule 5(2).

escaped the notice of the drafters of the CCMA rules, is the provision that a document may be served on a responsible employee at 'any office' of the state attorney. A public service employee of a government department who was dismissed in Pretoria may, for instance, lawfully serve a dispute referral on the state attorney in Durban, which may create practical problems for the proper and expeditious handling of the dispute later on.

Rule 5A confirms that a notice of proceedings before the CCMA, which includes conciliation and arbitration, may be delivered by giving notice by means of 'short message service' (sms). This provision, which had been introduced before this round of amendments, is a modern and progressive development. It takes account of current methods of communication. Rule 6, however, which deals with proof of service of documents, still makes provision for service via registered post, telegram or telex communication and telefax transmission. These provisions have remained unchanged.

Given the large number of default awards as well as applications for rescission that are made, it would have been preferable to do away with all archaic forms of service. Service by means of telegrams, telex and registered post has become obsolete and service should only have been permitted by a reliable means such as personal hand delivery, telefax (which is fast becoming old-fashioned), email or sms. This would make it easier to prove that proper service was effected. The retention of telex and telegrams is an anachronism that is difficult to comprehend at a time when there are known and ongoing challenges with the use of registered post as opposed to the much more effective and increasingly cheaper electronic telecommunication methods.

CCMA rule 7, dealing with how to file documents with the CCMA, provides this may be accomplished by hand delivery, registered post and faxing. Previously, rule 7 notwithstanding, the CCMA accepted emailing as a method of service in line with its relatively informal and expeditious procedures and was a first in the otherwise archaic ways of the legal and quasi-legal fora in South Africa. This rule has now been enhanced in so far as rule 7(1)(c) now prescribes that if documents are filed by means of email, they must be transmitted in MS Word or PDF format.

It is submitted that permitting the transmitting of documents in MS Word format, without the requirement of locking documents into PDF or protecting such documents, opens the door for the potential tampering or amending of documents. However, this seems a small price to pay for the convenience and efficiency of allowing service and filing by email, which will contribute to the speedy resolution of disputes.

Rule 8, dealing with 'Documents and notices sent by registered post' has remained unchanged. It provides that any document or notice sent by registered post 'is presumed, until the contrary is proved, to have

been received by the person to whom it was sent seven (7) days after it was posted'. As stated by the Roman comic dramatist Plautus, 'things which you do not hope happen more frequently than things you do hope'.¹⁷ Rule 8 stubbornly clings to the hope that service by registered post is an effective way to inform a party of a dispute or a proceeding in the CCMA. Sadly, postal services in South Africa have to a large degree become obsolete.¹⁸ Registered post is increasingly unreliable, cumbersome and ineffective. The expectation relating to the receipt of registered postal articles is perhaps presumptuous — the many rescission applications following default awards issued in the absence of parties who did not receive a registered postal item are testament to the degree to which registered post has become unreliable. The drafters should have simply done away with this antiquated service method.

Rule 9 that deals with condonation for the late delivery of documents¹⁹ remains unchanged. This rule should be distinguished from rule 35, which provides for condonation for any failure to comply with the rules. Importantly, a new rule 35(3) expressly excludes the provisions of rule 35 from applying to rule 25, which deals with representation at the CCMA.

3 CONCILIATION OF DISPUTES (RULES 10–16)

The amendments to the CCMA rules have not altered the provisions of rule 10 that describes how a dispute must be referred to the CCMA for conciliation. LRA form 7.11 is the 'document that initiates the process'.²⁰ The referring party, or his or her representative, must ensure that all parties to the dispute are properly cited. The applicant's name must be included on the LRA form 7.11, and the 'other' employees' names must be contained in an attached list.²¹ The applicant as well as other employees with an interest in the dispute must personally sign the document. If an employee refers an unfair dismissal dispute to the CCMA and also claims an amount in terms of the BCEA (for example, leave pay), it is preferable, but not fatal, to include the details of the claim for payment in the referral document.²² If the referral document is filed out of time, the applicant must attach an application for condonation in accordance with rules 9(3) and 31.

¹⁷ Attributed to Plautus, a Roman comic dramatist born circa 254 BC.

¹⁸ 'How South Africa's postal service compares to the rest of the world' *Businesstech* (8 June 2018) <https://businesstech.co.za/news/business/250373/how-south-africas-postal-service-compares-to-the-rest-of-the-world/>, accessed 10 October 2019, rates South Africa in 88th position out of 173 respondent countries.

¹⁹ The term 'documents' in the rule refers to 'any referral document or application'.

²⁰ See *Weltevrede Kwekery (Pty) Ltd v CCMA & others* (2006) 27 ILJ 182 (LC) in this regard.

²¹ rule 10(2).

²² s 74(2) of the BCEA; Marion Fouché *Rules of the CCMA and the Labour Courts* (2017) 16.

Rule 11 has been amended. Previously it prescribed that the CCMA must notify the parties in writing of a conciliation hearing at least 14 days prior to the scheduled date of the conciliation (unless the parties agreed to a shorter period). The amended rule 11(1) has reduced the 14-day period to seven days in respect of disputes relating to strikes²³ or large-scale operational requirements dismissals.²⁴ In respect of all other disputes, including unfair dismissal and unfair labour practice disputes, the parties still need to be notified 14 days prior to the proceedings. The shortening of the notification period is to be welcomed. This will bring the parties to the conciliation table earlier and thus allow for the expediting of the dispute resolution process — a critical factor during high-stake strike and retrenchment disputes.²⁵

A new rule 14A makes provision for the extension of the conciliation period in terms of the new s 135(2A) of the LRA. This section provides:

‘(2A) If an extension of the 30-day period referred to in subsection (2) is necessary to ensure a meaningful conciliation process, the commissioner or a party may apply to the director in accordance with any rules ... for an extension of the period, which may not exceed five days.

(2B) The director may only extend the period referred to in subsection (2A) if the director is satisfied that —

- (a) an extension is necessary to ensure a meaningful conciliation process;
- (b) the refusal to agree to the extension is unreasonable; and
- (c) there are reasonable prospects of reaching an agreement.

(2C) Subsections (2A) and (2B) do not apply to instances where the State is the employer.’

Rule 14A(2) stipulates that the request must be made on the prescribed form and before the expiry of the conciliation period as determined in terms of s 135 of the LRA.²⁶ Added to this, the director must within two days of receipt of the request consider the criteria referred to in subsection (2B) and advise the parties on whether or not the extension is granted and if the extension is granted, the period of such extension.

This addition to the rules is welcome. The CCMA has always emphasised the need for the speedy resolution of disputes, in line with the stated objectives of the LRA. In effect, the CCMA now has four bites at the cherry in its efforts to resolve disputes: pre-conciliation,²⁷ conciliation, the extended conciliation period that has now been

²³ s 64(1) of the LRA.

²⁴ s 189A(8) of the LRA.

²⁵ Although slightly differently worded, the new rule 11(2) still provides that, despite subrule (1), the CCMA ‘may give the parties a shorter notice period, if the parties have agreed or reasonable circumstances require a shorter notice period’. Rule 11(3) has also retained the principle that an ‘additional seven (7) days must be provided, if a notice of conciliation in terms of this rule is sent by registered mail only’.

²⁶ rule 17A(2)-(3).

²⁷ rule 12.

introduced and, finally, an option by the commissioner to revert to conciliation during an arbitration hearing.²⁸

4 CON-ARB AND ARBITRATION (RULE 17)

Rule 17 that deals with the con-arb procedure has been amended to accommodate amendments to the BCEA relating to compliance orders and the failure to pay amounts owing to employees. Nonetheless, the role and purpose of con-arb remains the same but has been extended regarding the types of disputes that are subjected to this type of dispute resolution. During con-arb, arbitration commences immediately after conciliation has failed.²⁹ This expedited procedure aims to reduce costs incurred at the CCMA and averts delays arising from the separation of time between conciliation and arbitration.³⁰

The following salient aspects of the con-arb procedure that flow from s 191(5) of the LRA remain the same: firstly, a con-arb must be conducted in all unfair labour practice and unfair dismissal disputes in relation to probation.³¹ Applicant employees and respondent employers may not object to con-arb in disputes relating to probation. Secondly, provided no party objects thereto, the CCMA is allowed to continue with con-arb in all other dismissal and unfair labour practice disputes that are eligible to be arbitrated.³²

In respect of the amended rule 17(1), apart from being streamlined, it still provides that the CCMA

‘must notify the parties in writing of a con-arb hearing at least fourteen (14) days prior to the scheduled date, unless the parties agree to a shorter period or reasonable circumstances require a shorter period. If a notification is sent by registered mail an additional seven (7) days must be allowed’.

Rule 17(2) also remains intact and directs that a party that intends to object to con-arb must deliver a written notice to the CCMA and the other party at least seven days prior to the scheduled date of the arbitration. In a significant development, the same principle that applies to probation disputes in terms of rule 17(3), in so far as parties may not object to the con-arb process, has been extended to

- (b) a dispute relating to a compliance order referred in terms of section 69(5) of the BCEA; or
- (c) a claim for failure to pay any amount owing referred to in terms of section 73A of the BCEA’.³³

²⁸ Section 138 of the LRA provides: ‘(3) If all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.’

²⁹ Fouché n 22 above 25.

³⁰ Darcy du Toit et al *Labour Relations Law: A Comprehensive Guide* (LexisNexis 2015) 145.

³¹ *ibid.*

³² *ibid.*

³³ rule 17(3)(b)-(c).

The new functions of the CCMA will undoubtedly place huge pressure on the resources of the CCMA. In the CCMA Annual Report 2017-2018 it is stated:

‘The CCMA anticipates an ordinary average annual five percent (5%) increase in case referrals in the 2018/19 financial year, with an additional five percent (5%) anticipated due to the introduction of the Employment Law Amendments and the NMW Act in the year of implementation, and a further 10% increase in the subsequent financial year. It is envisaged that there will be a further caseload increase in the 2020/21 financial year when the NMW Act is fully rolled out in the Domestic and Agriculture Sectors.’

With regard to the new functions of the CCMA in terms of the BCEA and the NMWA, significant new types of disputes can be referred to the CCMA. The CCMA has, since 1 January 2019, been tasked not only with arbitrating but also with conciliating three new disputes. Firstly, the BCEA makes it clear that in instances where inspectors have obtained a written undertaking or have issued a compliance order to an employer to pay any amount owed to the employee in terms of the BCEA or the NMWA, and the employer fails to comply, the director general may request the CCMA to make the undertaking or compliance order an arbitration award.³⁴ Enforcement was previously achieved by referring a compliance order to the Labour Court to have that compliance order made an order of the court.

The second type of dispute is where an employer refers a matter to the CCMA regarding the enforcement of an undertaking or a compliance order. It is uncommon for employers to refer disputes to the CCMA as the LRA predominantly caters for the enforcement of workers’ rights in relation to unfair dismissal and unfair labour practices. However, such referral by an employer will have the effect of staying the enforcement of a compliance order. The amended s 69(5) of the BCEA states:

‘(5) An employer must comply with the compliance order within the time period stated in the order, unless the employer refers a dispute concerning the compliance order to the CCMA within that period.’

Thirdly, any employee or worker as defined in s 1 of the NMWA³⁵ may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of the BCEA or the NMWA, a contract of employment, a sectoral determination or a collective agreement. However, this does not apply to employees or workers earning in excess of the threshold prescribed by the Minister of Labour in terms of s 6(3) of the BCEA.³⁶

³⁴ s 69 of the BCEA.

³⁵ In terms of s 1 of the NMWA ‘worker’ is defined as ‘any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind’.

³⁶ In terms of s 73A(3) of the BCEA persons earning more than the threshold may institute a claim concerning the failure to pay any outstanding amount in either the Labour Court, the High Court or, subject to their jurisdiction, the Magistrates’ Court or the Small Claims Court. The current threshold is R205 433 per annum.

This amendment will undoubtedly enhance the rights of lower earning workers by improving their access to informal and expeditious dispute resolution mechanisms. Subsequent to *Schoeman & another v Samsung Electronics (Pty) Ltd*,³⁷ there was uncertainty about whether the CCMA could be approached with respect to claims for unpaid remuneration. The Labour Court initially held that such claims did not fall under the definition of ‘benefits’ in terms of the CCMA’s power to arbitrate unfair labour practice disputes. Subsequently, the Labour Appeal Court (LAC) in *Apollo Tyres SA (Pty) Ltd v CCMA & others*³⁸ made it clear that the term ‘benefits’ is wide enough to cover claims for outstanding remuneration. The amendments to the CCMA rules facilitate such claims. All disputes relating to non-payment of salary as well as leave and notice pay will be subjected to the con-arb process in terms of s 191(5) of the LRA for employees earning below the threshold.

It is predicted that this amendment will greatly assist vulnerable groups of workers earning below the threshold amount. Rather than relying on inspectors of the department of labour to enforce non-payment issues, an applicant can utilise the relatively simple referral process by filling out and serving a CCMA LRA form 7.11 form on the employer. The CCMA will take the process further by notifying the employer when to appear for the con-arb. This mechanism does not however apply to those employees earning above the threshold amount. They will still have to approach the civil courts or the Labour Court to enforce their claims.³⁹ However, it is submitted that higher earning employees would still be at liberty to refer an unfair labour practice dispute and to claim unpaid salary through this avenue. The obvious benefit for employees⁴⁰ utilising the swift enforcement procedure provided by the amended BCEA is that con-arb is mandatory. This should lead to a quicker resolution of the dispute, either through arbitration or through an expedited settlement of the dispute due to the imminent threat of arbitration. The provisions relating to mandatory con-arb will not apply to higher earning employees who elect to follow the unfair labour practice course.

5 PRE-ARBITRATION CONFERENCES (RULE 20)

Rule 20 that deals with pre-arbitration conferences has been dramatically amended. Previously, the rules provided that the parties to an arbitration must hold a pre-arbitration conference only when directed to do so by the convening senior commissioner, the senior commissioner in charge

³⁷ (1999) 20 ILJ 200 (LC).

³⁸ (2013) 34 ILJ 1120 (LAC).

³⁹ A claimant may approach the Magistrates’ Court or, in terms of s 73A(3) of the BCEA, the Labour Court.

⁴⁰ ie employees whose earnings are below the prescribed threshold.

of a region or the presiding commissioner.⁴¹ Rule 20(1) now makes it mandatory for parties to conduct a pre-arbitration conference and to file a pre-arbitration minute in the following additional instances, namely where both parties are represented by a trade union, employers' organisation, legal practitioner or candidate attorney⁴² or both parties agree to hold a pre-trial [sic] conference.⁴³

This amendment is to be welcomed. Too many arbitration hearings are unnecessarily delayed or begin on the wrong foot without the issues having been properly delineated simply because a pre-arbitration minute is lacking. Despite the generally held view that an arbitration hearing is an informal procedure, it is usually sufficiently formal to require a proper road map of the dispute and the issues and the logistics relating thereto to enable the parties and the arbitrator to navigate seamlessly through the dispute process. Ironically, in a subconscious hint at the formality of arbitrations, the drafters erroneously refer in rule 20(1)(b) to the holding of a 'pre-trial conference'. In this note, reference is made to pre-arbitration conferences and minutes rather than 'pre-trial' conferences and minutes.

Rule 20(6) enjoins the parties to deliver a copy of the pre-arbitration conference minute to 'the appointed commissioner' within seven days of the conclusion of the pre-arbitration conference. Although the rule does not state that the minute should be signed by the parties or their representatives, it appears logical that the minute should be signed, because a signed minute is proof that the pre-arbitration conference has been concluded. In addition, rule 20(4) provides that '[u]nless a dispute is settled, the parties must draw up and sign a minute setting out the facts on which the parties agree or disagree'.

At first blush, the amended rule 20 appears confusing. However, read with rule 20(4)-(5), it makes sense to hold the pre-arbitration conference, to draw the minute, to sign it and to file a copy with the CCMA, as prescribed by rule 20(6).

The only practical problem that we foresee is the narrow time frame within which the parties must hold the pre-arbitration conference and file the pre-arbitration minute. If the CCMA gives the parties 21 days' notice of the scheduling of an arbitration hearing in terms of rule 21, the parties (if a pre-arbitration conference is compulsory) have only seven days in which to hold the conference and another seven days in which to file the minute. This time period has not been considered properly. We predict that parties who are represented in terms of rule 20(1)(a) will rely on rule 23(1) read with rule 23(2) and simply postpone the

⁴¹ The former rule 20(1). Fouché n 22 above 32 mentions that pre-arbitration conferences were not compulsory and that they could be conducted 'on paper'.

⁴² rule 20(1)(a).

⁴³ rule 20(1)(c). The CCMA rules should not refer to 'pre-trial conferences' but to 'pre-arbitration conferences'.

arbitration due to the short time frame in which parties must finalise the pre-arbitration conference unless both parties anticipate the scheduling of the arbitration and conclude the pre-arbitration conference as soon as the arbitration has been requested.

6 REPRESENTATION BEFORE THE CCMA (RULE 25)

In what we deem to be one of the most significant amendments to the rules, the much debated rule 25⁴⁴ that regulates representation before the CCMA has been amended. Since the inception of the CCMA in 1995, the architects of the LRA, rightly or wrongly, have adopted the policy decision to limit the role of legal practitioners during conciliation and arbitration proceedings. In the Explanatory Memorandum to the Draft Labour Relations Bill 1995⁴⁵ it was stated:

'Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach they adopt. Allowing legal representation places individual employees and small businesses at a disadvantage because of the cost.'⁴⁶

The rules differentiate between the admissibility of representatives during the processes of conciliation and arbitration. It has always been the stance of policy makers that legal representation should not be permitted during conciliation proceedings at all.

Before the latest amendments to the rules, rule 25(1)(a) had the effect that during conciliation a party to the dispute could appear in person or be represented only by directors or employees of the employer party to the dispute or a member of a close corporation or any employers' organisation representing the employer party and a member, office-bearer or official of a trade union representing the employee party. Apart from streamlining the wording of the rule it remains substantially the same.⁴⁷

⁴⁴ See Paul Benjamin 'Legal representation in Labour Courts' (1994) 15 *ILJ* 250 at 260; Debbie Collier 'The right to legal representation under the LRA' (2003) 24 *ILJ* 753; Stefan van Eck 'Representation during arbitration hearings: spotlight on members of bargaining councils' 2012 (4) *TSAR* 774.

⁴⁵ Explanatory Memorandum to the Draft Labour Relations Bill 1995 16 *ILJ* 319.

⁴⁶ Benjamin n 44 above 260 also opined that 'there are strong indications that a high degree of legal representation ... would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in the favour of employers'.

⁴⁷ Previously, rule 25(1)(a)(ii) provided that a party to the dispute might be represented by 'any office bearer, official or member of that party's registered trade union or registered employers' organisation' and now it stipulates that a person may be represented by 'any member of that party's registered trade union or registered employers' organization or an office bearer or official as defined in the Act'. Also rule 25(1)(a)(iii) provided that if the party was a registered trade union, it might be represented by 'any office bearer, official or member of that trade union authorised to represent that party' and now it reads 'any member of that trade union or any office bearer or official as defined in the Act and authorised to represent that party'. In a similar vein, rule 25(1)(a)(iv) has been reworded. It used to read that if the party was a registered employers' organisation, it might be represented by 'any office bearer or official of that party or a director or employee of an employer that is a member of that employers' organisation

However, in a minor addition to representation during conciliation, a new rule 25(1)(a)(v) directs that ‘if a party is the department of labour’ it may be represented by ‘any employee or official of the department of labour’. Although this clarification is to be welcomed, it is mystifying why it was deemed necessary to include this provision only in respect of the department of labour. Surely, in instances where other government departments are party to a dispute, they should also be permitted to be represented by any employee or official of that department.

During arbitration, the stance had always been that a party to a dispute had the right to appear in person or to be represented only by a ‘legal practitioner’ or a person entitled to represent the party at conciliation proceedings as discussed above. The LRA defines a legal practitioner as ‘any person admitted to practice as an attorney or an advocate in the Republic’.⁴⁸ This definition has not changed and it continues to exclude labour consultants and para-legal officials from representing parties before the CCMA.⁴⁹

However, in an important development, the rules have now been amended to include candidate attorneys as persons eligible to represent parties during arbitration.⁵⁰ This is a positive and rational development. Until now, candidate attorneys could do no more with their right of appearance certificates than be nominally present at arbitrations as observers.⁵¹ By contrast, attorneys, managers, trade union representatives and employers’ organisation representatives with little or no legal background are entitled to handle disputes. Allowing candidate attorneys — who are mostly legally qualified but lack experience — to appear in arbitrations constitutes an ideal opportunity for them to cut their teeth. This will also provide opportunities for impecunious individuals, who would otherwise not be able to afford experienced attorneys, to enjoy representation. The rules do not, however, define what is meant by a candidate attorney and it is suggested that it is any person who has concluded and registered a candidate attorney’s contract in terms of the Attorney’s Act.⁵²

authorised to represent it’ and now it provides that such party may be represented by ‘any director or employee of an employer that is a member of that employers’ organization or any official or office bearer as defined in the Act and authorized to represent that party’.

⁴⁸ s 213 of the LRA.

⁴⁹ In *Vac Air Technology (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* (2006) 27 ILJ 1733 (LC) it was held that labour consultants are not legal practitioners and may not appear on behalf of a party during arbitration proceedings. Before the amendments to the rules, in *Colyer v Dräger SA (Pty) Ltd* [1997] 2 BLLR 184 (CCMA) it was also held that candidate attorneys are not ‘legal practitioners’ as defined by the LRA. See also *SA Post Office Ltd v Govender & others* (2003) 24 ILJ 1733 (LC).

⁵⁰ rule 25(1)(b)(ii).

⁵¹ Candidate attorneys who are registered with a law society and who hold at least a LLB degree may be issued with a certificate of right of appearance which allows them to appear in the lower courts and such tribunals as are allowed.

⁵² Act 53 of 1979.

Although permitting legal representation during arbitration proceedings, CCMA rule 25(1)(c) contains important limitations to this right. The rule previously provided that if a dispute related to the unfair dismissal of an employee and the reason for the dismissal concerned alleged misconduct or incapacity, legal representatives were excluded from arbitration proceedings. This was a significant limitation as the majority of arbitrations before the CCMA dealt with unfair dismissal disputes in relation to misconduct and incapacity.

The rule has now been amended to extend this limitation to disputes 'referred in terms of section 69(5), 73 or 73A of the BCEA'. It follows that legal practitioners and candidate attorneys may not automatically represent their clients in disputes involving compliance orders pertaining to the provisions of the BCEA and the NMWA, and where the employer disputes liability by referring a dispute to the CCMA in respect of such compliance orders.⁵³ Legal practitioners and candidate attorneys are also excluded from automatic representation during arbitrations when the director general of the department of labour applies to the CCMA for a compliance order to be made an arbitration award if the employer has not complied with the order.⁵⁴ An employer may also not be legally represented at arbitrations when an employee refers a dispute to the CCMA for con-arb which relates to the non-payment of the minimum wage.⁵⁵ Although it may be argued by some that these disputes could constitute complex matters, policy makers have been consistent in limiting, rather than expanding, the right to legal representation to new types of disputes.

As in the past, despite the limitations placed on the presence of legal practitioners, a party may be legally represented (also by a candidate attorney) if the commissioner and all parties consent thereto⁵⁶ or if the commissioner decides that it will be unreasonable under the circumstances, to expect a particular party to appear without representation.⁵⁷

However, in a notable development, the right to be legally represented has now also explicitly been excluded during facilitations of large-scale retrenchments as contemplated in s 189A(3) of the LRA.⁵⁸

⁵³ See the amended s 69(5) of the BCEA.

⁵⁴ s 73 of the BCEA.

⁵⁵ In terms of the new s 73A of the BCEA.

⁵⁶ In *Strydom v Usuko Ltd* [1997] 3 BLLR 343 (CCMA) it was held that even if the parties agreed that both should be represented, the commissioner had to exercise his or her discretion in this regard. Also see *Bayley v Constantia Greetings (Pty) Ltd* [1997] 3 BLLR 298 (CCMA).

⁵⁷ In terms of rule 25(1)(c)(ii), when a commissioner exercises his or her discretion the following should be considered: the nature of the questions of law raised; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties or their representatives to deal with the dispute. These criteria have remained unchanged during the latest amendments of the rules.

⁵⁸ In terms of the new rule 25(1)(e).

Over the years there have been a number of attempts to withdraw the limitations on legal practitioners during arbitrations before the CCMA. In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & another*⁵⁹ the LAC considered whether an applicant has a constitutional right to be legally represented in arbitration proceedings at the CCMA. The court confirmed that the Promotion of Administrative Justice Act⁶⁰ did not apply to CCMA proceedings and that in terms of the common law no such absolute right had been developed.

This approach was endorsed by the Supreme Court of Appeal (SCA). In *CCMA & others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)*⁶¹ the court dismissed a challenge to the constitutionality of the rule limiting the right to legal representation and held that when the LRA was drafted ‘parties to social compromise were in agreement that legal representation in these cases should not be required or permitted . . . This was part of the system providing speedy and cheap redress to unfair dismissal’.⁶² The court concluded that the rule was sufficiently flexible to permit legal representation in deserving cases. The two cases should, however, be distinguished in one important respect. The *Law Society* case was not so much concerned with the applicant’s right to legal representation as the legal representative’s right to engage in her or his trade as a lawyer.⁶³

The amended rules have also retained the principle that a commissioner may exclude any person who is representing an employer party in any proceedings on the basis that the person is a member of the same employers’ organisation if the commissioner believes that the representative joined the employers’ organisation solely for the purpose of representing parties in the CCMA. This principle was introduced to curb the practice of attorneys or quasi-legal practitioners joining

⁵⁹ (2009) 30 *ILJ* 269 (LAC). The decision was taken on appeal to the Constitutional Court in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* (2009) 30 *ILJ* 1521 (CC) but the court declined to consider the matter on the ground that a long time had lapsed.

⁶⁰ Act 3 of 2000.

⁶¹ (2013) 34 *ILJ* 2779 (SCA).

⁶² *ibid* para 14.

⁶³ The *Law Society* judgment (para 24) states: ‘The law society challenged the subrule apparently on the basis that it unfairly discriminates against legal practitioners who are admitted as attorneys and advocates and are in private practice.’ And at para 25: ‘The law society also relied on s 22 of the Constitution to challenge the validity of the subrule. The section ensures that “[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law”. The law society’s founding papers barely deal with the effect of the subrule on its members’ choice of a trade, occupation or profession. The deponent stated that the effect of the rule was to exclude practicing attorneys and advocates from proceedings for which he or she was particularly skilled. Section 22 embraces both the right to choose a profession and the right to practice the chosen profession.’ Malan J dismisses the Law Society’s contentions as follows (para 26): ‘As I have said above, the law society did not present any evidence that the subrule works hardship on parties to CCMA arbitrations or point to any instance where there has been a refusal of legal representation prejudicing a party.’

employers' organisations for the sole purpose of getting a foot in the door as representatives during arbitrations.⁶⁴

Despite the limitations on the activities of legal representatives, the amended rules have clarified the way in which an application should be brought for legal representation and what criteria should be considered by the commissioner. This, it is submitted, in a positive manner erodes the limitations placed on the presence of representative as long as it is in the interests of justice. The new rule 25(6) provides that

'the commissioner may, on application brought in accordance with rule 31, allow a person not contemplated in sub-rule (1) to represent a party at arbitration proceedings before the commission, after considering —

- (a) whether it is unreasonable to expect the applicant party to deal with the dispute without representation, after considering the factors set out in sub-rule (1)(c)(ii) (a) to (d);
- (b) the reason why a person contemplated in Rule 25(1)(b) cannot represent the applicant party, which includes affordability, if applicable;
- (c) the ability of the proposed representative to meaningfully represent the applicant;
- (d) whether the proposed representative is subject to the oversight and discipline of a professional or statutory body;
- (e) whether the proposed representative will contribute to the fairness of the proceedings and the expeditious resolution of the dispute;
- (f) prejudice to the other party;
- (g) any other relevant factors'.

This addition to the rules is in direct response to the unreported ruling by Van Niekerk J and the CCMA's practice note in compliance of the order that addresses representation, mainly by advice centres, for indigent employees and is to be welcomed.⁶⁵ In essence, it amounts to this. Subject to a commissioner applying her or his mind to any such request, the commissioner has an unfettered discretion regarding the category of persons to be permitted during arbitrations. Irrespective of the representative's qualifications and professional associations, the commissioner has freedom of choice to permit representation of a person as long as it enhances the fairness of the proceedings and the expeditious resolution of the dispute. This is, however, subject to the bringing of a proper application and the opportunity for the opposing party to contest such application.

On a practical level this gives effect to what is already occurring at the CCMA. CCMA commissioners generally do permit parties to be represented in instances where either the parties agree to representation or where a substantive application has been lodged.

⁶⁴ See *AHI Employers' Organisation obo Members v CCMA* (2012) 33 ILJ 1106 (LC); Van Eck n 44 above 774.

⁶⁵ See *The Casual Workers Advice Office (CWAO) & others v CCMA & others* 20 September 2016 case no J645/16 unreported; Practice Note 2/2016 issued by the CCMA. Practice Note 2/2016 is virtually copied verbatim in rule 25(6).

7 JOINDER AND CONSOLIDATION (RULES 26 AND 28)

Rule 26 that deals with the joining of any number of persons as parties to the proceedings has been expanded and clarified. Previously the rule only referred to joinder if the right of such parties to relief depended on 'substantially the same question of law or fact'. It now states that an order of joinder may be made if

- (a) The right of the referring party to relief depends on substantially the same question of law or fact, which, if a dispute were to be referred separately against the person sought to be joined, it would arise in a separate claim;
- (b) the party to be joined has a substantial interest in the subject matter of the proceedings; or
- (c) the party to be joined may be prejudicially affected by the outcome of the proceedings'.

This is a positive development in as far as commissioners have now been provided with the concise reasons that would justify joinders being permitted. The conciliating commissioner has an obligation to raise the issue of joinder if a party with a direct interest in the matter needs to be joined. Should this not be done, it is reviewable.⁶⁶

The CCMA rules have also been improved in so far as the consolidation of disputes is concerned. The amended rule 28 now for the first time sets out that a commissioner of her or his own accord or by consent of the parties or on application may consolidate more than one dispute so that the disputes may be dealt with in the same proceedings where

- (a) the relief sought in each of the separate dispute [sic] to be consolidated, [sic] depends on the determination of similar or substantially the same questions of law and fact. [sic]
- (b) there will be no substantial prejudice on [sic] the party or parties sought to be joined through a consolidation order;
- (c) the balance of convenience favour [sic] such consolidation; and
- (d) the CCMA has jurisdiction on [sic] all disputes sought to be consolidated'.

These additions should also be viewed in a positive light. The added detail will guide commissioners and foster consistency in their awards in this regard.

8 DISCLOSURE OF DOCUMENTS (RULE 29)

Previously rule 29 merely provided that a commissioner might at any time after the request for arbitration make an order as to the disclosure of relevant documents and that the parties might agree on the disclosure of documents.⁶⁷ In a positive development, rule 29(1) has been amended and it now reads that at any time after the request for arbitration, 'but

⁶⁶ *State Information Technology Agency (Pty) Ltd v Swanevelder & others* (2009) 30 ILJ 2786 (LC).

⁶⁷ Fouché n 22 above 44 mentions that rule 29 'makes it possible for a party to seek discovery of documents or other evidence in arbitration proceedings'.

not less than fourteen (14) days prior to the hearing date, either party may request the other party to disclose any documents or material relevant to the dispute'. To this, rule 29(2) adds that 'the party to whom the request is made must respond to the request within five (5) days from the date on which the request was received'. Rule 29(3) states: 'A commissioner may either before or during the proceedings on his/her own accord, or on application, make an order as to the disclosure of relevant documents or other evidence.'

This amendment is sensible and far-reaching as it gives practical effect to the general need to prepare for arbitrations properly. Up until now, the exchange of documents has regularly been a haphazard and last-minute affair, with parties exchanging documents at the arbitration or on the day before. To leave such an important aspect in the preparation for arbitration in the hands of the parties is to invite disaster or at least to create fertile grounds for postponement.

In terms of the new rule 29, either party may request, not less than 14 days prior to the arbitration hearing, the other party to disclose any documents or material that may be relevant to the dispute. In dismissal for misconduct disputes, this may typically include disciplinary or incapacity notices, charge sheets and findings, transcripts of disciplinary hearings, video material, photos and polygraph results. It is useful to exchange these documents and material prior to the hearing for at least two important reasons: to obviate postponements and to place both parties in a position to prepare fully and properly for the hearing so that all the evidence may be ventilated at the arbitration. At the same time, the commissioner is given access to the material that will form the bedrock of the dispute, which will enable her or him to deal more easily with the oral evidence that is presented. Recalcitrant parties may be sanctioned by the arbitrator should they fail to comply with the request for documents.⁶⁸ This amendment should be commended because it strikes a fair balance between the formal requirements for discovery as applied in the courts and the more informal procedures of the CCMA.

A further notable addition is the power granted to a commissioner to make a ruling before the commencement of the proceedings regarding the disclosure of documents. This is an important feature because it enables the commissioner to ensure timeously that the matter is ripe for arbitration. Whether or not the CCMA file will actually be presented to the commissioner (presuming a commissioner is indeed allocated to the matter beforehand) in a sufficiently timeous manner for her or him to make a ruling that will actually benefit the process remains to be seen. At least this constitutes an instrument that is available to parties

⁶⁸ This may take the form of an adverse costs order or a ruling postponing the matter to allow for proper compliance.

to force the other party, who may be intent on delaying the matter or frustrating the process, to comply with rulings.

9 APPLICATIONS (RULES 31, 32 AND 37)

Rule 31 that deals with applications remains almost unchanged. The only amendment is that a proviso was added to rule 31(2), which now reads:

‘(2) *Subject to Rule 32*, an application must be brought at least fourteen (14) days prior to the date of the hearing on notice to all persons who have an interest in the application.’⁶⁹

Rule 32 (which also remains intact) prescribes that applications for variation or rescission of arbitration awards or rulings must be made within 14 days of the date on which the applicant became aware of the arbitration award or ruling. The amendment of rule 31(2) therefore appears to be only for purposes of clarification.

However, as concerns applications, it is doubtful whether the drafters have done enough in their quest to improve the functioning of the CCMA in general. Rule 31 applies to the following applications in particular:

- (a) application for condonation, joinder, substitution, variation, rescission or postponement;
- (b) application in a jurisdictional dispute; and
- (c) other preliminary or interlocutory application’.

In its present form, rule 31 requires the bringing of an application at least 14 days before the hearing.⁷⁰ However, there are many instances where an interlocutory application may be necessary, but where the matter has not yet been scheduled for a hearing. The drafters could have addressed this aspect by also referring to applications where the matter has not been set down for hearing. This would enjoin the case management officer to set the matter down for the hearing of the interlocutory application without waiting for an arbitration to be set down.

A new rule 31A explains how to apply for picketing rules in terms of s 69(6B) of the LRA. Applications must be brought in the prescribed LRA form 7.11 format with supporting documentation. The application must be served on all relevant parties and, unless the parties agree otherwise, the CCMA must set down the application within two days of receipt of the application. The inclusion of this rule is appropriate and will enhance the regulation of disputes about picketing. Although

⁶⁹ Emphasis added.

⁷⁰ See also Fouché n 22 above 47 who states that a ‘formal application is required for condonation, joinder, substitution, rescission, variation, postponement, a jurisdiction challenge and any other preliminary or interlocutory issue, such as legal representation, correction of citation and the consolidation of matters’.

two days may seem like a short period, there can be no doubt that such a short time limit is fitting against the background of the significance of picketing rules during strikes.

As mentioned above, the CCMA has been allocated significant new functions. One of these deals with the application and enforcement of written undertakings and compliance orders in terms of the BCEA and the NMTWA. Rule 31B deals with applications in terms of which written undertakings and compliance orders are made arbitration awards. Rule 31B(2) directs that such applications must be lodged on the prescribed BCEA form 15. Among others, it must set out the full name and authority of the applicant; the date on which the written undertaking was secured or the compliance order issued; the date on which the employer ought to have complied; the relevant provisions with which the employer allegedly failed to comply; and the relief sought. The rule also details the documents that must be attached to the application.⁷¹ The application, which could be brought by an employee or the department of labour, must be signed by the applicant and served on all persons who have an interest in the matter, including the employer and the employee.⁷² An employer may object to a written undertaking or compliance order being made an arbitration award by serving and filing an affidavit setting out its grounds for objection in accordance with the provisions of the rule.⁷³ The employer must deliver an 'objection affidavit' to the department of labour and any affected employee(s) and file it with the CCMA within five days from the date on which the application was served on the employer.⁷⁴ The applicant party may deliver a reply within three days from the day on which any objection is served on it.⁷⁵ The CCMA must appoint a commissioner to determine the application by considering the documents,⁷⁶ or the commissioner may request the allocation of a hearing date.⁷⁷

⁷¹ Rule 31B(3) provides that the 'application must be supported by the following documents:

- (a) a copy of the undertaking or compliance order;
- (b) in the case of a compliance order, proof that the compliance order was served on the employer in accordance with the BCEA;
- (c) if applicable, any documents related to securing a written undertaking or issuing a compliance order, including, a complaint or grievance, an inspection report or other notes made during an inspection and any relevant records of the employer;
- (d) if the inspector is not the person signing the prescribed form, a confirmatory affidavit signed by the inspector;
- (e) supporting witness or third party affidavits, where applicable; and
- (f) any other relevant documents'.

⁷² rule 31B(4).

⁷³ rule 31B(5).

⁷⁴ rule 31B(6).

⁷⁵ rule 31B(7). Rule 31B(8) provides that the reply may only address issues raised in the objection affidavit and may not introduce new factual or legal issues.

⁷⁶ rule 31B(9).

⁷⁷ rule 31B(10).

The detailed rules pertaining to the enforcement of written undertakings and compliance orders are welcome. As mentioned above, it also remains to be seen to what extent the CCMA will be successful in dealing with these additional functions over and above its already heavy workload. In effect, the CCMA has been burdened with functions which were previously conferred on the department of labour and the labour courts.

Rule 37 that deals with the issuing of subpoenas is problematic. Previously, subpoenas had to be served by hand on the witness who is being subpoenaed to testify or appear at the CCMA. Now, subpoenas must be served at least seven days before the arbitration hearing on the witness personally by hand, or by leaving a copy of it at the witness's place of residence or place of business or employment with a person who apparently is at least 16 years of age, or by registered post.⁷⁸ It is questionable whether, in an effort to make it easier to serve subpoenas, it has not become easier to avoid subpoenas. A witness who fails to attend the CCMA on account of her or him not having received a subpoena which was served by registered post has the easiest of excuses to explain her or his non-attendance. Once again, this archaic form of service, in the form of registered post by a highly ineffective postal service institution, does little to enhance effective service delivery and may potentially create more postponements and adjournments of CCMA hearings due to the non-receipt of a subpoena.

An additional worrisome feature relates to proof of payment. Service of a subpoena must be accompanied by proof of payment of the prescribed gazetted witness fees and the witness's reasonable travel costs and subsistence expenses.⁷⁹ It is problematic for a litigant to pay such costs in the event of a reluctant, uncooperative or even hostile witness.

10 COSTS (RULE 39)

Rule 39 that deals with costs has also been amended. However, given the scarcity of costs orders in the CCMA, it is doubtful that the amendments will have much of an effect. The director of the CCMA may no longer appoint taxing officers to determine disputes and costs have been set at a fixed rate of R7 000 per day.⁸⁰ If a candidate attorney appears, costs are pegged at 50% of the fixed daily rate.⁸¹ No mention is made of disbursements relating to travelling costs, preparation time, reading of documents, telephone calls and consultations. Added to this, the rules are silent on applications that are considered on paper. In short, costs at the CCMA are for the most part a non-event. The daily

⁷⁸ rule 37(5).

⁷⁹ rule 37(6).

⁸⁰ rule 39(4). This amount includes VAT.

⁸¹ rule 39(5).

fees at the CCMA have been kept low in line with making appearances there affordable. However, the awarding of costs will also not be seen as a big threat to litigants who could otherwise have been dissuaded from bringing or continuing with a frivolous dispute. It also has very little force of reprimand for abuse of process.

11 CONCLUSION

On the whole, the amendments are to be welcomed. For the most part, the drafters have succeeded in working towards a goal of expeditious labour dispute resolution. The architects of the amendments have succeeded in providing detail to existing rules that had previously been lacking, and detailed provisions have been included regarding the CCMA's new functions in terms of the BCEA and the NMWA. The most prominent aspects that are to be applauded are, firstly, that details have been provided in respect of con-arb procedures relating to the new functions of the CCMA pertaining to the enforcement of written undertakings and compliance orders; secondly, that provision has been made for compulsory pre-arb conferences prior to arbitrations under certain circumstances; thirdly, that legal representation has been extended to candidate attorneys in instances where legal practitioners do have this right; and, finally, that the rules now make provision for compulsory disclosure of documents and evidence and provide for time limits in certain circumstances.

Nonetheless, the drafters of the amendments have not risen to the occasion in respect of a number of issues. The most significant shortcoming is that archaic forms of service have not been removed. The postal service has become unreliable and it was a mistake to retain service and notification by registered post as part of the rules. Added to this, telexes have become a relic of the past and should have been removed as a means of service. In respect of these issues, it is submitted that the drafters of the amendments have failed to grasp the opportunity to modernise the rules and to keep in touch with the realities with which indigent employees as well as practitioners are faced.