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## **FROM THE OFFICE OF THE DIRECTOR OF THE CCMA**

### **URGENT DIRECTIVE IN RESPECT OF ACCESS TO THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION**

The following Directives will apply with effect from 11 May 2020 until CCMA operations may be normalized and the restrictions set out in the Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 provide otherwise.

1. These Directives are issued in conformity with all Directives and Regulations, particularly those issued by the Minister of Employment and Labour and the Minister of Public Service and Administration, issued in terms of section 27(2) of the Disaster Management Act and in terms of the authority vested in the Director of the CCMA in terms of section 118(2) (b) of the Labour Relations Act 66 of 1995, as amended (**hereinafter referred to as the "LRA"**) and will become effective immediately upon publication.
2. These Directives set out how, and under what conditions, matters enrolled in the CCMA will be dealt with until such Directives are repealed. These Directives must be read together with the Rules for the Conduct of Proceedings before the CCMA, as amended (**hereinafter referred to as the "CCMA Rules"**) and all applicable statutes.

3. These Directives are grounded in the projection of a prolonged period of lockdown resulting from the Covid-19 pandemic. Albeit that the President of the Republic of South Africa may announce changes to the levels of lockdown, the extent to which the need for social distancing and other health and safety regulations will remain in place require strict efforts to minimise exposure to the infection.

#### REFERRING DISPUTES TO THE CCMA

4. The following applies to the referral of disputes to the CCMA:
  - 4.1 Until directed otherwise by the CCMA, parties will not be able to submit physical copies (hard copies) of completed referral forms to the CCMA. CCMA Rule 7 allows, amongst other ways, for service of referrals by means of electronic mail (hereinafter referred to as “e-mail”) and facsimile.<sup>1</sup>
  - 4.2 The use of any electronic signature<sup>2</sup> or electronic confirmation process will be accepted if such proof can be stored safely and retrieved and printed when needed.

#### CONCILIATION HEARINGS

5. Unnecessary physical contact among persons must be avoided. Thereby, only hearings that are compliant with the requirements of this Directive will be set down for a physical hearing, unless agreed otherwise<sup>3</sup> between the Parties and the Commission. The following applies to the resolution of disputes through Conciliation in terms of section 135 of the LRA.
  - 5.1 Where possible, the resolution of disputes through Conciliation, subject to different conditions that may apply to conciliation hearings linked to certain matters of mutual **interest or ‘public interest’ disputes**, will take place telephonically or through a digital

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<sup>1</sup> The CCMA is currently working on alternative online platforms that may be utilized for referral purposes. Once these are ready for use, the public will be notified accordingly.

<sup>2</sup> In terms of Section 13 of the Electronics Communications and Transactions Act 25 of 2002 (hereinafter referred to as the “ECTA”), an electronic signature means “data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature”.

<sup>3</sup> The parties and the Commission can agree in writing to hold the hearing at an alternative venue or at a CCMA venue.  
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online platform that is to the satisfaction of the CCMA or the Commissioner. Choice of the form of communication will also depend on that which is available to both parties and to the CCMA.

5.2 In the event that the conciliation process could not take place within 30-days from date of referral, and in the absence of any agreement reached by the Parties prior to the expiry of the 30-day period to extend this period, a certificate of outcome will be issued by the CCMA and in terms of section 135(5) of the LRA.<sup>4</sup>

5.3 Where Parties agree to settle the dispute, where possible, the terms of the settlement agreement will be recorded electronically and the settlement agreement will be sent to both Parties by electronic means for signature. Where a Party or both Parties do not have access to an electronic signature, the parties and the Commissioner will agree on an acceptable way to record agreement on the content of the settlement agreement and such record will be filed with the CCMA.

#### APPLICATION PROCEEDINGS (E.G. CONDONATION, RESCISSION, VARIATION, LEGAL REPRESENTATION, ETC)

6. The following Directives apply to interlocutory and other application proceedings.

6.1 Application proceedings, unless directed otherwise by the Commission or Commissioner, will not be scheduled for oral hearings in an open hearing venue. Where application proceedings cannot be dealt with in terms of written submissions, these will be dealt with by video conferencing facilities.

6.2 In circumstances where oral evidence is required and one or more Parties are unable to access one or more form of electronic communication, the CCMA may direct that the matter be heard on a date when conditions related to the Covid-19 pandemic

<sup>4</sup> Please note that the Labour Appeal Court in *SAMWU obo Manentza v Ngwathe Local Municipality* (2015) 36 ILJ 2581 (LAC) at par 39, held that “neither the holding of an actual conciliation nor the issue of a certificate of non-resolution by the CCMA or the bargaining council concerned, is a prerequisite for purposes of referring an unfair dismissal or unfair labour practice dispute to arbitration or adjudication in terms of s191(5)(a) and (b) of the LRA, where there has been a lapse of 30 days from the date on which the CCA or bargaining council received the referral and the dispute remains unresolved.”

allow for the Parties to attend a hearing in person, or in a way that the Commissioner may prescribe.

6.3 The use of any electronic signature or electronic confirmation process will be accepted if such proof can be stored safely and retrieved and printed when needed.

6.4 Where an application is made in the form of a statement without a signature, the CCMA requires confirmation from the submitting party through electronic means such as SMS, WhatsApp, voice recording or any electronic method that is not in the public domain and that can be stored safely, retrieved and printed by the CCMA.

6.5 Where a Ruling is issued by the Commissioner, this will be sent to the parties by electronic means. Where a party wishes to collect a physical copy of the Ruling, this will only be permitted if Regulations and Directives issued in terms of section 27(2) of the Disaster Management Act allow for this and the CCMA is satisfied that occupational health and safety requirements are in place.

#### ARBITRATION PROCEEDINGS AND INQUIRIES BY ARBITRATOR

7. The following Directives apply:

7.1 Prior to scheduling Arbitration hearings, and subject to CCMA Rule 20, the Parties must be directed to hold a pre-arbitration conference to reach consensus on those issues listed in CCMA Rule 20(3), and the following –

7.1.1 Whether the Parties are prepared to proceed with the arbitration hearing at the employer's premises.<sup>5</sup>

7.1.2 Whether the Parties are prepared to proceed with the arbitration hearing by means of a video conferencing facility.

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<sup>5</sup> Subject to conformity to the occupational health and safety standards set out in Covid-19 Occupational Health and Safety Measures in Workplaces Covid-19 (C19 OHS), 2020 GG 43257 published in terms of section 27(2) of the Disaster Management Act (57/2002).

- 7.1.3 Should the parties not agree to the options set out in in 7.1.1 and 7.1.2, the reasons for such non-agreement are to be included in the pre-arbitration minute.
- 7.1.4 Acceptance of shorter periods of notice of set-down, if required.
- 7.1.5 The applicable video conferencing facility to be utilised for the arbitration hearing.
- 7.1.6 The admission of evidence remotely using the video conferencing facility.
- 7.1.7 In the event that a witness does not have access to video conferencing facilities, agreement on how such evidence will be adduced.
- 7.1.8 Admission of evidence by affidavit or by statement that may be confirmed, if so required by the Commissioner.
- 7.1.9 Any other information the CCMA or a Commissioner may require in order to exercise a discretion as to how the matter is to be dealt with and that will eliminate or limit the risk of physical proximity among the persons involved.
- 7.2 Agreements reached in terms of 7.1 must be recorded in writing and submitted to the CCMA.
- 7.3 As per CCMA Rule 19, the CCMA may direct the requesting Party to deliver a statement of case that sets out the material facts upon which the Party relies and the legal issues that arise from the material facts; and may direct the responding Party to deliver an answering statement within a specified time period. Parties may also be requested to attempt to reach an agreement on what oral evidence may be delivered by statement, or where possible, by affidavit. Such statements or affidavits must be submitted electronically to the Commission seven (7) days prior to the scheduled date of the arbitration hearing, unless a shorter period of time is agreed to in writing by the Parties.

- 7.4 The CCMA shall communicate via e-mail, or any other means available, with the Representatives, or in the absence of Representatives, with the individual Parties concerned, and, having regard to the arrangements the Parties have made or are capable of making, exercise a discretion as to how the matter is to be disposed of and the presiding Commissioner may give *ad hoc* Directives.
- 7.5 Where a party requires the presence of a witness, and the said party is entitled to administrative assistance<sup>66</sup> from the CCMA, a Commissioner may direct any party to be present and/or available on a time and date as determined by the Commissioner. This may only happen if the Commissioner is satisfied that the other requirements for a person to be served has been met.
- 7.6 CCMA Rule 37(5) allows for the Applicant who has brought the application for subpoena, to serve the subpoena on the witness and such service may be done electronically.
- 7.7 The CCMA will keep a record of any instruction related to the subpoena and means by which the instruction was served on the witness.
- 7.8 Where an arbitration hearing is completed, the arbitration award will be sent to the Parties by electronic means within the timeframes stipulated by section 138 of the LRA. Where a party wishes to collect a physical copy of the award, this will only be permitted if Regulations and Directives issued in terms of section 27(2) of the Disaster Management Act allow for this and the CCMA is satisfied that occupational health and safety requirements are in place.
- 7.9 The above will also apply to an Inquiry by Arbitrator process, where applicable.

#### CASES WHERE PARTIES APPEAR IN PERSON (PHYSICAL ATTENDANCE)

8. In those matters where a Party appears in person, the following applies:

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<sup>66</sup> Administrative assistance provided in terms of section 115(2)(bA) of the LRA.  
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- 8.1 The CCMA shall abide by all Regulations and Directives that are issued in terms of section 27(2) of the Disaster Management Act. Thus, it is only in terms of such Regulations and Directives that the CCMA may convene physical hearings at one or more of its premises or at a venue agreed to by the Parties and the CCMA in writing.
- 8.2 Representatives and Parties who are required to travel to the venues discussed in 8.1 above, must comply where applicable with any restrictions that exist or that may be imposed from 01 May 2020.
- 8.3 Anyone seeking access into the CCMA buildings or the designated other venue to be utilised for a hearing, must submit to compulsory screening, must wear a face mask, must apply hand sanitizer, and must adhere to applicable social distancing rules.
- 8.4 Only the Parties, where they do not exceed ten (10) in number, subject to the size of the venue, taking into consideration the compulsory social distancing rule, and their Representative shall enter the CCMA buildings or designated other venues.
- 8.5 Should any Party object to have the matter dealt with under the conditions described above, that party must submit the notice of objection and reasons for such objection in writing and serve same on the other party and on the CCMA. The Commissioner or a Provincial Senior Commissioner, after consideration of the submissions and of possible reasonable alternatives, must decide whether the matter should proceed or be postponed.

## COMMUNICATION

9. During the period when public access to the CCMA office are restricted, all communication between the Parties and the CCMA must be sent by electronic means where such communication may be printed out to be copied, or could be saved electronically. The CCMA and the Parties will provide the respective e-mail addresses to be utilised for this purpose.

10. While section 138 of the LRA gives Commissioners discretion in the conduct of arbitration hearings, it is strongly recommended that the following protocol be applied for the orderly conduct of Video Conference Hearings:

10.1 Participants shall ensure that there is no ambient noise in the room which can interfere with the audio quality during the hearing.

10.2 In general, subject to any ad hoc Directives given by the Commissioner and / or Commission, the participants shall mute their microphones when not actually speaking.

10.3 The Commissioner shall invite participants to speak and everyone shall be alerted to the **Commissioner's** directions in this regard.

10.4 Participants shall remain in the hearing and leave it only when the proceedings have concluded, or as directed by the Commissioner.

10.5 The Commissioner shall give instructions as to the recording of the proceedings.

10.6 Where the CCMA is not the host of the video conference and is thus not able to record the proceedings using the chosen online facility, the Party hosting the video conferencing session must record the session and submit the audio file at close of proceedings to a stipulated e-mail address for retention by the Commission. A signed statement of confirmation that the recording has not been tampered with in any way must accompany the recording.



MR CAMERON SELLO MORAJANE

DIRECTOR OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION