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

### **DIRECTIVE IN RESPECT OF ACCESS TO THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION DURING THE COVID-19 PANDEMIC**

**This Directive serves to replace the Directives that regulated access to the Commission for Conciliation, Mediation and Arbitration that were issued by the CCMA Director on 08 May 2020 and 14 May 2020 respectively.**

**The Directive will apply with effect from 01 August 2020.**

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 on **01 August 2020**.
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set out how, and under what conditions, matters enrolled in the CCMA will be dealt with until such Directives are repealed.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 **need to ensure the health and safety of CCMA personnel and all those who use and contribute to the services provided by the CCMA in light of the rampant spread of the Covid-19 virus across South Africa**. 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 are not permitted to visit any of the CCMA offices for purposes of making enquiries, submitting or collecting referral forms, or dropping off referrals and other related documents**. CCMA Rule 7 allows, amongst other ways, for service of referrals by means of electronic mail (hereinafter referred to as “e-mail”) and facsimile. **Applications for conciliation and arbitration hearings and applications for condonation of the late application of alleged unfair dismissal, alleged unfair labour practice and alleged unfair discrimination disputes, may also be made using the CCMA’s online referral platform. The online referral platform is accessible through the CCMA’s website [www.ccma.org.za](http://www.ccma.org.za), the CCMA Facebook page, and directly by typing the following web link in an internet browser <https://cmsonline.ccma.org.za>. Parties wishing to track the progress of their cases are encouraged to download the free-to-use #CCMAConnect App for this purpose.**
  - 4.2 The use of any electronic signature<sup>1</sup> or electronic confirmation process will be accepted if such proof can be stored safely and retrieved and printed when needed.

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<sup>1</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”.

## CONCILIATION HEARINGS AND FACILITATION OF LARGE-SCALE RETRENCHMENT DISPUTES (SECTION 189A OF THE LRA)

5. Unnecessary physical contact among persons must be avoided. **As of 01 August 2020, the use of hearing venues within CCMA offices will be minimised and at the discretion of the Commission.** The following applies to the resolution of disputes through Conciliation, in terms of section 135 of the LRA, and **Large-scale retrenchment facilitations in terms of section 189A 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, **may** take place through one of the following means, in order of preference: by telephone; or through a digital online platform that is to the satisfaction of the CCMA or the Commissioner; **or at a suitable external venue<sup>2</sup> (e.g. the employer's premises); or at a CCMA office.**

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>3</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

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<sup>2</sup> External venues utilised for CCMA hearings, processes and interventions, must conform with 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).

<sup>3</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."

agree on an acceptable way to record and confirm agreement on the content of the settlement agreement and such record will be filed with the CCMA.

- 5.4 **Parties to the facilitation of a large-scale retrenchment process are required to attempt to reach consensus on the means through which the facilitation process will proceed, in order of preference: through a digital online platform or at a suitable external venue (e.g. the employer's premises). Should the Parties not agree to either of these options, the reasons for such non-agreement must be submitted to the CCMA in writing and the CCMA will then decide on the appropriate means through which the facilitation will proceed.**

#### **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 **through one of the following means, in order of preference: at a suitable external venue (e.g. the employer's premises) or at a CCMA office.**
- 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 **or by post**. Where a party wishes to collect a physical copy of the Ruling, this will only be permitted **by prior arrangement with the Provincial Office where the case was referred**.

## 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 **may** be directed to hold a pre-arbitration conference to reach consensus on those issues listed in CCMA Rule 20(3), and the following- <sup>4</sup>

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

7.1.2 Whether the Parties are prepared to proceed with the arbitration hearing at a suitable external venue (e.g. the employer's premises).

7.1.3 Should the Parties not agree to the options set out 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.

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<sup>4</sup> In the event of a part-heard matter where minutes of a pre-arbitration conference have already been submitted, the Parties will be required to reach consensus on items 7.1.1 – 7.1.9 of these Directives, the minutes of which will constitute an addendum to the existing pre-arbitration conference minutes.

- 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. **In the absence of an agreement, the CCMA will decide on the appropriate means through which the arbitration hearing may proceed.**
- 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>55</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.

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<sup>55</sup> Administrative assistance provided in terms of section 115(2)(bA) of the LRA.

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 **or post** 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 **by prior arrangement with the Provincial Office where the case was referred.**

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:

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 **Covid-19** restrictions **and Regulations in place on the date of travel.**

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.

Commission for Conciliation, Mediation and Arbitration.

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. **Where a party seeks to physically deliver a document to the CCMA, this may only be done by prior arrangement with the Provincial office where the dispute was referred and is being managed.**

## PROTOCOL TO BE FOLLOWED IN VIDEO CONFERENCE HEARINGS

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 **all** 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.



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**MR CAMERON SELLO MORAJANE**

**DIRECTOR OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION**

**CCMA**

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