THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 005/13

In the matter between:

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **FIRST APPELLANT**

THE DIRECTOR, COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **SECOND APPELLANT**

THE MINISTER OF LABOUR **THIRD APPELLANT**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **FOURTH APPELLANT**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES (INCORPORATED AS THE LAW SOCIETY OF THE TRANSVAAL) **RESPONDENT**

Neutral citation:	*CCMA v Law Society, Northern Provinces* (005/13) [2013] ZASCA 118 (20 September 2013).
Coram:	Nugent, Malan, Wallis JJA, Van der Merwe and Swain AJJA
Heard:	**6 September 2013**
Delivered:	**20 September 2013**

Summary: Labour Relations Act 66 of 1995 – constitutionality of rule 25(1)(*c*) of the rules of the Commission for Conciliation, Mediation and Arbitration – ss 9(3), 22, 33 and 34 of Constitution.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Tuchten J sitting as court of first instance).

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court below is set aside and replaced with the following:
   'The application is dismissed with costs including the costs of two counsel.'

JUDGMENT

MALAN J (Nugent, Wallis JJA and Van der Merwe and Swain AJJA concurring):

[1] This appeal is concerned with the constitutionality of rule 25(1)(*c*) of the rules for the conduct of proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA),[1] a matter that was left open by the Constitutional Court in 2009.[2] The subrule limits the right to legal representation in CCMA arbitration proceeedings concerning the fairness of dismissals for misconduct or incapacity and subjects it to the discretion of the commissioner, unless the commissioner and all the parties consent. Tuchten J in the North Gauteng High Court declared the subrule to be unconstitutional and invalid but suspended the declaration of invalidity for a period of 36 months to enable the parties to consider and promulgate a new subrule. He made no order as to costs. The appeal is with his leave.

Basis of the application

[1]Rules for the Conduct of Proceedings before the CCMA, GN R1448, *GG* 25515, 10 October 2003.
[2]*Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* 2010 (2) SA 269 (CC) paras 9 and 13.

[2] The application of the Law Society of the Northern Provinces was based on the grounds that the subrule unfairly discriminated against legal practitioners[3] in violation of s 9(3) of the Constitution and the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act); that it infringed s 22 of the Constitution which guarantees every person the right to choose his or her trade, occupation and profession freely; and that the exclusion of legal representation infringed s 34 of the Constitution which ensures that every person has the right to have any dispute that can be resolved by the application of law resolved in a fair public hearing before a court or another independent and impartial tribunal or forum. It was further contended that legal representation was denied in CCMA arbitrations on the basis that they were of an administrative nature. In fact, the Law Society submitted, these proceedings were more akin to judicial proceedings. Following this, the further submission was made that s 3(3) of the promotion of Administrative Justice Act 3 of 2000 (PAJA) was irrelevant in determining the constitutionality of the subrule.

[3] A right to legal representation exists for the benefit and protection of litigants. In this case the Law Society does not purport to be pursuing the interests of those who use the services of the CCMA. Indeed, there is not the slightest suggestion in its papers that the restriction on the right to legal representation causes hardship to or has operated to the prejudice of those affected by it. Nor is there any suggestion that the major parties concerned with labour disputes – employers' organisations and trade unions – support the application of the Law Society. The sole concern of the Law Society in bringing this litigation is that the subrule denies work to its members. Nothing in the Constitution nor any decided cases suggests that lawyers have a right to receive business. Where they receive business through the operation of the courts or other tribunals that is because their clients have a right to employ their services and not because they have a right to provide them.

Rule 25

[4] Rule 25 provides as follows:

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[3] A legal practitioner is 'any person admitted to practise as an advocate or an attorney in the Republic' (s 213 of the Labour Relations Act 66 of 1995 (the LRA). See *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* [2009] 4 BLLR 299 (LAC) para 27 per Musi JA.

‘Representation before the commission.—(1) (*a*) In conciliation proceedings a party to the dispute may appear in person or be represented only by—

(1) a director or employee of that party and if a close corporation also a member thereof; or

(2) any member, office bearer or official of that party’s registered *trade union* or registered employers’ organisation.

(*b*) In any arbitration proceedings, a party to the dispute may appear in person or be represented only by:

(1) a legal practitioner;

(2) a director or employee of that party and if a close corporation also a member thereof; or

(3) any member, office-bearer or official of that party’s registered *trade union* or a registered employers’ organisation.

(*c*) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee’s conduct or capacity, the parties, despite subrule 1 (*b*), are not entitled to be represented by a legal practitioner in the proceedings unless—

(1) the commissioner and all the other parties consent;

(2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering—

(*a*) the nature of the questions of law raised by the dispute;

(*b*) the complexity of the dispute;

(*c*) the public interest; and

(*d*) the comparative ability of the opposing parties or their representatives to deal with the dispute.

(2) If the party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of this rule, the commissioner must determine the issue.

(3) The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of this Rule.

(4) A representative must tender any documents requested by the commissioner in terms of subrule (3), including constitutions, payslips, contracts of employment, documents and forms, recognition agreements and proof of membership of a trade union or employers' organisation.'

The effect of these provisions is that in *conciliation* proceedings legal representation is not allowed at all. The reason is obvious: conciliation is not coercive. In *arbitration* proceedings, however, legal representation is permitted on an unqualified basis except where the dispute is concerned with the fairness of dismissals for misconduct or incapacity. But legal representation (as opposed to representation by other representatives such as trade union officials) is not excluded in the latter cases altogether and it is permitted in the circumstances set out in rule 25(1)(*c*)(1) and (2), that is, where the Commissioner and all parties consent; or the Commissioner is of the view that it is unreasonable to expect a party to proceed without legal representation after taking account of the factors referred to, including the complexity of the matter and the comparative ability of the parties or their representatives to deal with the dispute.

The CCMA

[5] The CCMA plays a central role in the resolution of labour disputes. During the year ending March 2011 154 279 referrals were made to it.[4] It was established by s 112 of the LRA on 1 Janaury 1996. It is an independent organisation (s 113) with jurisdiction throughout the Republic (s 114). Its primary functions are to resolve, through conciliation, disputes referred to it (s 115(1)(*a*)), and to arbitrate disputes that remain unresolved (s 115(1)(*b*)). The commissioners, who must be 'adequately qualified persons' (s 117), have wide powers to resolve a dispute (s 142) and –

'may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities' (s 138(1) of the LRA).[5]

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[4]Andrew Levy and Tanya Venter (eds) *The Dispute Resolution Digest 2012 Tokiso Dispute Settlement* (2012) at 23.
[5]*Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) para 85.

A party to a dispute may, subject to the commissioner's discretion, give evidence, call witnesses, cross-examine the other party's witnesses and address concluding argument to the commissioner (s 138(2)). Within fourteen days of the conclusion of the arbitration the commissioner must issue an arbitration award 'with brief reasons' (s 138(7)(*a*)). A settlement agreement may be made an arbitration award (s 142A). An arbitration award issued by a commissioner is final and binding and may be enforced as if it were an order of the Labour Court (s 143(1) but may be reviewed (s 145).

Judgment of the court below

[6] Tuchten J found in favour of the Law Society, although his judgment is not primarily based on the causes of action articulated in the founding papers. He rather based his judgment on the principle of legality, which was not expressly relied upon by the Law Society, and a perceived inconsistency between the subrule and s 3(3) of PAJA. The principle of legality,[6] he said, required the exercise of public power to be lawful. It must be neither arbitrary nor irrational. The rules of the CCMA themselves, the framing of which is an example of an administrative decision,[7] must be rational. But, he continued, it did not follow that a rule or other administrative decision may be set aside if it was imperfect or if its purpose could have been achieved in a better way. Only when the decision, on a consideration of the reasons for it, was such that no reasonable person could have taken it will it be set aside for irrationality.

[7] He considered the subrule to be irrational and arbitrary and did not accept any of the reasons advanced by the CCMA for the exclusion of legal representation in cases of misconduct and incapacity (see below paragraphs 10 ff). He thought that the dismissal of an employee was always a serious matter for the employee. Nor did he accept the evidence that the presence of lawyers within the arbitration process would oftenlead to obfuscation, unnecessary complication of the issues and time wasting. Although this may occur, he thought that the solution was to appoint presiding officers who could deal appropriately with such conduct. In the vast majority of cases, he said, lawyers contributed to the efficient and speedy resolution

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[6] See *Judicial Service Commission & another v Cape Bar Council & another* 2013 (1) SA 170 (SCA)para 21.
[7] See *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 135.

of disputes. He disagreed with the view[8] that the commissioner could determine beforehand whether a matter was complex and allow representation accordingly. Frequently, Tuchten J said, a matter which appeared to be simple turned out to be complex. Nor did he accept that one could determine *a priori* that one category of cases was not complex irrespective of the merits of the individual matters and provide in general for the exclusion of legal representation in them. The court below was urged not to fix things that were not broken. Despite the weighty considerations underlying the subrule and its application since 1995, he nevertheless found it to be arbitrary and irrational.

[8] Tuchten J further held, although it was not contended by the Law Society, that rule 25(1)(*c*) was inconsistent with s 3(3)(*a*) of PAJA which provides:

'In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to –

(a) obtain assistance and, in serious or complex cases, legal representation ...'

Tuchten J found that the subrule did not, as does s 3(3)(*a*) of PAJA, confer a discretion in a serious case which is not also a complex case. The subrule also, so he said, impermissibly trenched upon the discretion conferred by s 3(3)(*a*) of PAJA in relation to serious cases.

[9] He dismissed as irrelevant the argument that a change in the subrule to allow legal representation would significantly increase the work load of the CCMA and impair its ability to perform its core functions. Nor did he consider the effect of his order and its implications for, for example, legal aid. No evidence of the cost and other implications was in fact placed before him. In the result, Tuchten J found that the appellants had not established that the limitation of the right to legal representation was reasonable and justifiable. The limitation, he found, was arbitrary. It was irrational to draw a distinction between the different types of disputes on the basis that the bulk of arbitrations involved cases of dismissal for misconduct or incapacity. As I will show, he misconstrued the test for rationality and conflated it with an inquiry in terms of s 36 of the Constitution.

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[8] Musi JA in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* [2009] 4 BLLR 299 (LAC) para 38.

Historical context

[10] Section 115(2A)(*k*) empowers the CCMA to regulate in its rules 'the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings'. Rule 25 was enacted pursuant to this power. Its precursors, ss 138(4) and 140(1) of the LRA, were repealed by s 12 of Labour Relations Amendment Act 12 of 2002 but were in materially similar form as rule 25(1)(*b*) and (*c*) of the rules of the CCMA.[9] Transitional provisions were provided for in item 27 of Part H of Schedule 7 to the LRA.

[11] The historical context of the subrule is described by Ms Nerine Beverlee Kahn, the director of the CCMA in her answering affidavit. Rule 25(1)(*b*) and (*c*) and its precursors came about as part of the process of establishing a new labour dispensation. The process is described in the Explanatory Memorandum prepared by the Ministerial Legal Task Team in January 1995.[10] An initial draft Bill was produced by the Task Team in order to assist the social partners to reach consensus on a new labour relations dispensation for South Africa.[11] Kahn described the eventual passing of the LRA as 'a product of a unique and important process of social dialogue in the formulation and implementation of labour laws'.

[12] In compliance with the Republic's international obligations the National Economic, Development and Labour Council Act 35 of 1994 was enacted, and the Council established in 1995 in terms of s 2 of that Act. The Council consists of members who represent organised business, organised labour, organisations of community and development interest and the state (s 3). The Council is obliged to 'consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament' (s 5(1)(*c*)). The governing body of the CCMA inter alia consists of members nominated by the NEDLAC members representing organised labour, organised business and the state (s 116 of the LRA). The governing body makes the rules of the CCMA under the powers given by s 115(2A) of the LRA. The draft Labour Relations Bill was tabled before NEDLAC in February 1995.

[13] In the initial draft submitted to NEDLAC the Task Team had proposed significant limitations on the right of parties to be legally represented in proceedings

[9] *GN* R961, *GG* 23611 of 25 July 2002.
[10] Published in (1995) 16 *ILJ* 278.
[11] (1995) 16 *ILJ* at 280.

before the Commission. This was motivated in the Explanatory Memorandum as follows:[12]

'International research shows that our system of adjudication of unfair dismissals is probably one of the most lengthy and most expensive in the world. And yet it fails to deliver meaningful results and does not enjoy the confidence of its users. Not surprisingly, dismissals trigger a significant number of strikes.

'The draft Bill explicitly regulates unfair dismissal and clearly states the permissible and impermissible grounds for dismissal. The procedural requirements for fair dismissal are clarified as are competent remedies. A speedy, cheap and non-legalistic procedure for the adjudication of unfair dismissal cases is provided.'

The limitation of the right to legal representation was motivated in the Explanatory Memorandum as follows:[13]

'Legal representation is not permitted during arbitration except with the consent of the parties. 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.'

[14] The parties to the NEDLAC negotiations agreed that in arbitration proceedings concerning the fairness of dismissals for misconduct or incapacity legal representation should be permitted only where circumstances justified it and that it should be in the discretion of the arbitrating commissioner whether those circumstances were present. The agreement was embodied in the now repealed s 140(1) of the LRA which was enacted in 1995. Schedule 8 to the LRA contains a Code of Good Conduct for dismissals. The subrule proceeds from the premise that the bulk of cases involving dismissal for misconduct or incapacity are less serious, in the sense of being less complex, are regulated by a code of conduct and should be adjudicated swiftly and with the minimum of legal formalities. The parties to the social compromise were in agreement that legal representation in these cases should not be required or permitted unless justified by the nature of the legal issues that may arise, the complexity of the matter, the public interest and the comparative

[12](1995) 16 *ILJ* at 285.
[13](1995) 16 *ILJ* 319. For criticism, see Peter Buirski 'The Draft Labour Relations Bill 1995 – The Case for Legal Representation at its Proposed Fora for Dispute Resolution' (1995) 16 *ILJ* 529 and Neil van Dokkum 'Legal Representation at the CCMA' (2000) 21 *ILJ* 836.

ability of the parties and their representatives. This was part of the system providing speedy and cheap access to redress unfair dismissals and limiting available remedies, in particular by capping compensation.[14]

[15] This recalls the words of Zondo JP in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others*:[15]

'Anyone who has had anything to do with our labour law and the dispute resolution system in the labour field will know that, by far, the majority of cases that affect employers and employees and that "consume" public resources are dismissal cases and most of the dismissal cases are those relating to dismissal for misconduct. The legitimate Government purpose in relation to the provision of compulsory arbitration under the Act was to provide a speedy, cheap and informal dispute-resolution system. If you failed to achieve that goal in regard to disputes concerning dismissals for misconduct, you would never achieve that goal in respect of the entire Act.

If one has a look at all the cases in which the Act provides for a right to legal representation, one will note a common denominator to the cases. That is that of all these cases occur very seldom. Indeed, they are few and far between. Furthermore, the issues that arise in most of them can be quite technical, for example, demarcations, essential services and others.

If provision was to be made for an absolute or general right to legal representation in respect of such disputes, that would make a serious contribution towards taking our new dispute-resolution system in the 1995 Act back to the pre-1994 dispute-resolution system under the Labour Relations Act 28 of 1956 which had become totally untenable by the time the 1995 Act was passed. That cannot be done.'

[16] The dispute resolution system under the LRA requires that disputes under this Act first be resolved through conciliation before they can be referred to arbitration (s 133 of the LRA). The dismissal disputes that may be referred to the commission are 'automatically unfair dismissals' (s 187), dismissals based on 'operational requirements' (s 189A) and dismissals based on the employee's misconduct or incapacity (s 188). As Ms Kahn stated in her answering affidavit, dismissals of the first two kinds may give rise to more serious legal and industrial relations consequences. Those in the third category, she continued, are regarded as the most

[14] An early suggestion to exclude legal representation in labour disputes was made by Paul Benjamin 'Legal Representation in Labour Courts' (1994) 15 *ILJ* 250.
[15] *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* [2009] 4 BLLR 299 (LAC) paras 44, 45 and 46.

common and least complicated disputes that arise in the workplace; they usually involve one worker only and not the whole workforce. It is thus in this sense that she termed them less 'serious'. No one can dispute that a dismissal may entail 'serious' consequences for an employee. This, however, is not the issue. The reason for limiting legal representation as provided for in the subrule is not the gravity of the consequences of the dismissal for the employee. Disputes of different kinds are resolved by the CCMA. In some legal representation may be had as of right. The latter category includes, *inter alia*, disputes concerning organisational rights, collective agreements, workplace fora and the disclosure of information.[16] See, for example, the disputes referred to in sections 22, 24, 38, 62 and 74 of the LRA. These disputes are inherently more technical and legalistic and often require the interpretation of contracts and legislation.[17] The subrule thus deals with a certain category of disputes, not involving organisational disputes, and it is legitimate to provide different methods of resolving them.[18]

[17] Dismissal disputes comprise more than 80 per cent of all matters referred to the CCMA. A large majority of these disputes concern disputes for misconduct and incapacity. The evidence of Ms Kahn shows that approximately 80 per cent of dismissal disputes relate to dismissals for misconduct. The statistics for the three years from 2008 to 2011 recorded the presence of a legal representative only in cases where awards were made. During this period some 68 137 awards in unfair dismissal cases were made: 1 948 relate to dismissals for incapacity and 30 559 to dismissals for misconduct. Legal representation was present in 6 028 of all unfair dismissal cases, and in 174 incapacity dismissal cases and in 2 975 misconduct dismissal matters. Ms Kahn attributes the apparent discrepancy in these figures to the fact that employees state that they do not know the reason for their dismissal. One or both parties have been legally represented in approximately 10 per cent of dismissal disputes that have proceeded to arbitration. There is no significant difference between cases where the parties are entitled to be represented as of right and those where their representation is subject to the commissioner's discretion.

Right to legal representation in the CCMA?

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[16] *Netherburn* para 39 per Musi JA.
[17] *Netherburn* para 40 per Musi JA.
[18] *Netherburn* para 40 per Musi JA.

[18] The CCMA is not a court.[19] Arbitration proceedings in the CCMA constitute administrative action and a commissioner conducting a CCMA arbitration is performing an administrative function.[20] Administrative tribunals, generally, are required to take decisions that are consistent with PAJA.[21] However, the Constitutional Court held that PAJA does not apply to the review of CCMA arbitrations and said that s 145 of the LRA was 'suffused' with the constitutional standard of reasonableness: namely whether the decision is such that it could not be reached by a reasonable decision maker.[22] The provisions of the LRA must be interpreted in compliance with the Constitution (s 3 of the LRA). Section 33(1) of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. But the contention that this requires there to be a right to legal representation in every case of a hearing before an administrative tribunal such as the CCMA, is contrary to long-standing and binding authority.

[19] The courts have consistently denied entitlement to legal representation as of right in fora other than courts of law.[23] As Innes CJ said:[24]

'No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none.'

The common law, however, recognises a right to a procedurally fair hearing in civil and administrative matters which may, in the circumstances of the case, require recognition of the right to legal representation.[25] The Bill of Rights expressly refers to the right 'to choose, and to consult with, a legal practitioner' (s 35(2)(*b*)), and 'to choose, and be represented by, a legal practitioner' (s 35(3)(*f*)), but this is said in the context of an arrest for allegedly committing an offence (s 35(1)) and the right to a fair criminal trial (s 35(3)). Section 33 dealing with just administrative action contains

[19] *Fredericks & others v MEC for Education and Training, Eastern Cape, & others* 2002 (2) SA 693 (CC) paras 30-1; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) paras 80 ff and paras 85-7.
[20] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) paras 80 ff and paras 88 and 140.
[21] Cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) paras 25-26.
[22] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) paras 80 ff and para 104. See *Herholdt v Nedbank Ltd* (701/2012) [2013] ZASCA 97 (5 September 2013) para 12.
[23] *Dabner v South African Railways and Harbours* 1920 AD 583 at 598; *Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others* 2002 (5) SA 449 (SCA) paras 5 ff; *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* [2005] 2 All SA 479 (SCA) para 11.
[24] *Dabner v South African Railways and Harbours* 1920 AD 583 at 598.
[25] *Hamata* para 5.

no reference to such a right.[26] Nor does PAJA, which was enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to be given written reasons where rights have been adversely affected, refer to such an absolute right.[27] Instead it confirms the common law.[28] In *Hamata* Marais JA concluded:[29]

'In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness.'

He further said that, although there was no common law imperative to allow legal representation, the common law nevertheless required disciplinary proceedings to be fair and if:[30]

'in order to achieve such fairness in a particular case legal representation may be necessary, a diciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion'.

Section 3(3)(*a*) of PAJA

[20] Tuchten J found that rule 25(1)(*c*) was inconsistent with s 3(3)(*a*) of PAJA because the subrule rule did not confer a discretion in a serious case which was not also complex. I do not think that PAJA applies to the procedures adopted by CCMA arbitrators. Neither s 33 of the Constitution nor PAJA precludes specialised legislative regulation of administrative action alongside general legislation such as PAJA. However, such specialised regulation must comply and be consistent with s 33.[31] PAJA, as I have said, does not apply to the review of CCMA arbitrations. The LRA sets out in specific terms in ss 138 and 142 how CCNA arbitrations are to be conducted. The reasoning that led the theConstitutional Court in *Sidumo* to hold that the LRA created a self-contained regime for reviews of arbitration awards equally

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[26] *Hamata* para 8.
[27] *Hamata* para 9.
[28] Referring to *Bel Porto School Governing Body & others v Premier, Western Cape & another* 2002 (3) SA 265 (CC) at 295G. See *Minister of Public Works & others v Kyalami Ridge Environmental Association & another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) para 101.
[29] Para 11.
[30] *Hamata* para 23 and see *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* [2005] 2 All SA 479 (SCA) para 11.
[31] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) para 91.

applies to the separate regime it created in those sections for the fair conduct of arbitrations by the CCMA. PAJA was accordingly inapplicable in this case.

[21] In any event, Tuchten J in coming to his conclusion ignored the impact of the discretion afforded a commissioner by the subrule. A request for legal representation may be made at any time and not necessarily at the outset of the arbitration. The subrule indeed allows the commissioner considerable latitude in allowing legal representation. It may be allowed where the commissioner and all the parties agree. In addition, the commissioner may allow it in exercising his or her discretion when he or she considers that it is 'unreasonable to expect a party to deal with the dispute without legal representation' after consideration of the listed factors. The listed factors are: the nature of the questions of law raised by the dispute; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties or their representatives to deal with the dispute. The subrule does not disallow other forms of representation. Nor does it exclude the consideration of other relevant considerations.[32] These factors may well, in a given case, include the seriousness of the individual consequences of a dismissal, assuming that this is not already encompassed by the subrule, which I doubt.[33] The commissioner must, if satisfied that it is appropriate to do so, also determine a dispute about legal representation if one of the parties objects or if he or she suspects that the representative does not qualify in terms of the rule. In addition, in terms of s 191(6) of the LRA the Director of the CCMA must on request by a party refer a dispute about the fairness of a dismissal or an unfair labour practice to the Labour Court after considering the reason for the dismissal, the questions of law raised, the complexity of the dispute, any conflicting arbitration awards and the public interest. A party is of right entitled to legal representation in the Labour Court (s 161). The subrule and other provisions of the LRA are therefore sufficiently flexible to allow for legal representation in deserving cases.

Rationality of the rule

[22] Tuchten J concluded that the subrule was arbitrary because it identifies one category of cases for diffferent treatment irrespective of the merits of the individual

[32] Cf *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* [2005] 2 All SA 479 (SCA) para 12: it could not have been intended to limit the commissioner to the listed factors only.
[33] Cf *Dladla v Administrator, Natal* 1995 (3) SA 769 (N) at 777B-D.

cases. The constitutional requirement of rationality is an incident of the rule of law which requires all public power to be sourced in law. When making laws the legislature is constrained to act rationally and not capriciously or arbitrarily. It must act to achieve a legitimate government purpose. A decision whether a legislative provision or scheme is rationally related to a governmental object entails an objective enquiry.[34] As it was stated by the Constitutional Court:[35]

'It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.

It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad.'

The fact that the subrule distinguishes between different kinds of cases does not per se render the rule irrational.[36] The history of the subrule and the nature of the historical compromise reached show that the bulk of cases referred to the CCMA involve unfair dismissals for incapacity and misconduct. The legislature identified these matters as the appropriate category where the policy considerations underlying the need to exclude legal representation should find application. The courts cannot interfere with rational decisions that have been made lawfully on the ground that they consider a different decision preferable.[37] The judge in the court below disregarded the considered judgment of the experts who first drafted the LRA; the social partners at NEDLAC who endorsed their views on the proper approach to legal representation before the CCMA and the extensive experience of the CCMA and the labour courts that an automatic right to legal representation in these cases

[34] *Law Society of South Africa & others v Minister for Transport & another* 2011 (1) SA 400 (CC) paras 32 and 33.
[35] *Law Society of South Africa & others v Minister for Transport & another* 2011 (1) SA 400 (CC) paras 34 and 35 and *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) paras 85 and 86 and see *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) paras 75-78.
[36] *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) para 25; *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) para 31.
[37] *Bel Porto School Governing Body & others v Premier, Western Cape & another* 2002 (3) SA 265 (CC) para 45.

was inconsistent with the aim of expeditious and inexpensive resolution of these disputes. He did so without any evidence to support his own views.

Section 9(3) of the Constitution

[23] Section 9(3) of the Constitution provides that the State may not unfairly discriminate, directly or indirectly, against anyone on one or more grounds, including race, gender etc.[38]

[24] 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. It contended that whereas directors of companies, and other legal persons, members of close corporations and trade union officials may as of right appear in any arbitration, legal practitioners may do so in dismissal cases for misconduct or incapacity only at the discretion of the commissioner. Nor, the argument went, is there a similar prohibition against a union official or director of a company who may be legally qualified. However, it is not the case of the Law Society that its members were denied recognition of their inherent dignity by the subrule,[39] nor that the alleged discrimination relates to one or more of the grounds listed in chapter 2 of the Equality Act.[40] This is fatal to its contentions as the jurisprudence of the Constitutional Court amply demonstrates that infringements of equality rights are inextricably linked to infringements of dignity and there are none in this case.

Freedom of trade

[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, ocupation or professsion 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 practising attorneys and advocates from proceedings for which he or she was particularly

[38]The Law Society also relied on the Equality Act but did not provide any factual basis for its contentions. See Iain Currie and Johan de Waal *The Bill of Rights Handbook* (2013) 6ed at 244-249.
[39]*Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) para 31; *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) para 41; *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) para 50.
[40] Currie and De Waal at 244 ff.

skilled. Section 22 embraces both the right to choose a profession and the right to practise the chosen profession.[41] Limitations on the right to freely choose a profession, it was said,[42] are not to be lightly tolerated:

'But we live in a modern and industrial world of human interdependence and mutual responsibility. Indeed we are caught in an inescapable network of mutuality. Provided it is in the public interest and not arbitrary or capricious, regulation of vocational activity for the protection both of the persons involved in it and of the community at large affected by it is to be both expected and welcomed.'

The rule does not purport to regulate entry into the profession, nor does it affect the continuing choice of practitioners to remain in the profession.[43] It only impacts on a litigant's right to be represented in a particular forum. For the reasons considered above the subrule meets the rationality standard.[44]

Section 34 of the Constitution

[26] The Law Society contended that the subrule was in conflict with s 34 of the Constitution. Section 34 provides:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

In advancing this contention the Law Society relied on *Badingdawo & others v Head of the Nyanda Regional Authority & another: Hlantlalala v Head of the Western Tembuland Regional Authority & others*,[45] a judgment in which Madlanga J held that, despite the absence of a provision to that effect in the Interim Constitution 200 of 1993, a party to civil proceedings was entitled to legal representation as of right, because:

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[41] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 66.
[42] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 60.
[43] Cf *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 69.
[44] No argument was addressed by the Law Society on the question whether a valid limitation of s 22 in terms of s 36 of the Constitution was involved.
[45] *Badingdawo & others v Head of the Nyanda Regional Authority & another: Hlantlalala v Head of the Western Tembuland Regional Authority & others* 1998 (2) SACR 16 (Tk) at 31B. Cf *Attorney-General of Lesotho v Mopa* 2002 (6) BCLR 645 (Les, CA).

‘[T]he right of access to court and of having justiciable disputes settled by courts would be rendered entirely nugatory if, in respect of civil proceedings, it were to be held that there is no constitutional right to legal representation.’

However, he was dealing with regional authority courts established under the Regional Authority Courts Act 13 of 1982 (Transkei), which are courts and not administrative tribunals. There is no unqualified constitutional right to legal representation before administrative tribunals.[46]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 prejuding a party.

[27] For all these reasons the appeal should be upheld.

Order

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court below is set aside and replaced with the following:
   ‘The application is dismissed with costs including the costs of two counsel.’

F R MALAN
JUDGE OF APPEAL

[46]See above paras 18 and 19.

APPEARANCES:

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