

CCMA RULE: 25

WHO MAY REPRESENT PARTIES AT CONCILIATION AND ARBITRATION?

PARTY	WHO MAY REPRESENT AT CONCILIATION AND ARBITRATION?
Employer	A director or employee of the employer.
Close corporation	A member or employee of that close corporation.
Employee who is a member of a registered trade union	Any member or office bearer or official of that party's registered trade union.
Employer who is a member of an employer's organisation	Any member or office bearer or official of that party's registered employer's organisation.
A registered trade union	Any member of that trade union or any office bearer or official as defined in the Act and authorised to represent that party or an office bearer or official as defined in the Act of a registered federation of trade unions and authorised to represent that party.
A registered employer's organisation	Any director or employee of an employer that is a member of that employers' organisation or an official or office bearer as defined in the Act and authorised to represent that party or an office bearer or official as defined in the Act of a registered federation of employers' organisations and authorised to represent that party.
The Department of Employment and Labour	Any employee or official of the Department.
The Employee who is Not a member of a registered trade union	Subject to the discretion of the commissioner and on consideration of Rule 25(6).

WHEN MAY A LEGAL PRACTITIONER OR A CANDIDATE ATTORNEY REPRESENT A PARTY?

A legal practitioner and a candidate attorney may automatically represent a party as follows:

- In all *limine* hearings, irrespective of the nature of the underlying dispute;
- In all arbitration hearings other than:
 - dismissals based on conduct;
 - dismissals based on capacity (performance or ill health);
 - referrals in terms of section 69(5) [where an employer refers a dispute concerning a compliance order that was issued against that employer in terms of section 69 of the BCEA, to the CCMA];
 - section 73 of the BCEA [to have an compliance order made an award]; and
 - section 73A of the BCEA [claims for failure to pay any amount owing in terms of the National Minimum Wage Act 2018, a contract of employment, a collective agreement, or sectoral determination].

Where representation by a legal practitioner and candidate attorney is NOT automatically permitted at arbitration, the presiding commissioner may allow such representation if:

- the commissioner and all the other parties consent;
- the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
 - 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.

Limitation on legal representation v the Constitution.

Limitation on the right of parties to be represented by legal practitioners does not infringe on the Constitution because the commissioners retain the discretion to allow legal representation. The discretion vested in the commissioner must therefore be exercised judicially, i.e., after having considered the factors applicable to such application.

WHO MAY REPRESENT PARTIES AT FACILITATION OF LARGE-SCALE RETRENCHMENT PROCEEDINGS – S189A OF THE LRA?

In any facilitation of large-scale retrenchments as contemplated in section 189A (3) of the LRA, a party may appear in person or be represented by:

- If the party is the employer, a director or employee of the party; and
- If a close corporation, a member or employee of that close corporation;
- Any member of that party's registered trade union or employers' organisation or office-bearer or official [must be authorised to represent the party].

NB: Rule 25(1)(e).

In terms of Rule 25(1)(e), legal practitioners or candidate attorneys may not represent parties in facilitations of large-scale retrenchment proceedings [as contemplated in section 189A(3)].

A commissioner may not exercise discretion to allow for such representation in section 189A (3) facilitation proceedings.

PARTY	WHO MAY REPRESENT AT LARGE SCALE RETRENCHMENT FACILITATIONS
Employer	A director or employee of the employer.
Close corporation	A member or employee of that close corporation.
Employees who are members of a registered trade union	Any member or office bearer or official of that party's registered trade union.
Employer who is a member of an employer's organisation	Any member or office bearer or official of that party's registered employer's organisation.
A registered trade union	Any member of that trade union or any office bearer or official as defined in the Act and authorised to represent that party or an office bearer or official as defined in the Act of a registered federation of trade unions and authorised to represent that party.

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A registered employer's organisation	Any director or employee of an employer that is a member of that employers' organisation or an official or office bearer as defined in the Act and authorised to represent that party or an office bearer or official as defined in the Act of a registered federation of employers' organisations and authorised to represent that party.
Representation by a legal representative or candidate attorney is not allowed. No discretion.	

agreements and/or proof of membership of a trade union or employers' organization.

Rule 25(5): Where a commissioner finds that –

- a) The representative joined the employer's organization for the purpose of representing parties at the Commission; or
- b) The representative's participation in the dispute resolution process:
 - i. would be contrary to the purpose of the rule which is to promote inexpensive and expeditious dispute resolution in a manner that is equitable to all parties;
 - ii. is not in keeping with the objectives of the Labour Relations Act 66 of 1995; or
 - iii. may have the consequence of unfairly disadvantaging another party to the dispute.

- whether the proposed representative will contribute to the fairness of the proceedings and the expeditious resolution of the dispute;
- prejudice to the other party; and
- any other relevant factors.

KEY POINTS

In conclusion, while the commissioner may exercise discretion to allow for a party to be represented by someone other than those set out in sub-rule (1), such discretion only applies to ARBITRATION.

Legal representatives/candidate attorneys have an automatic right to represent parties at in *limine* hearings.

Where the Department of Employment and Labour is a party, any employee or official of the Department may represent it.

Representatives should always be in possession of documents that may serve as proof of, e.g., membership of a registered trade union or employer's organisation; being an employee of the employer; etc.

There is no discretion to allow for a party in a large-scale retrenchment facilitation process to be represented by a legal representative or candidate attorney.

Only legal representatives and candidate attorneys may charge a fee or receive a financial benefit for agreeing to represent a party at a hearing.

- Rule 31 should be followed when applying to be represented by a person other than those set out in the Rules.

FACTORS TO CONSIDER - BROADER DISCRETION TO ALLOW FOR REPRESENTATION AT ARBITRATION

Rule 25(6)

Despite the provisions of this Rule, but subject to the provisions of sub-rule (1)(f), the commissioner may, on application brought in accordance with rule 31, allow a person not contemplated by sub-rule (1) to represent a party at arbitration proceedings before the Commission.

The party that makes such an application needs to motivate in terms of the following:

Why it will be unreasonable for that party to continue with the arbitration without representation. Refer to -

- the nature of the questions of law that are raised by the dispute;
- the complexity of the matter;
- the public interest in the dispute; and
- the comparative ability of the opposing parties or their representatives to deal with the dispute;
- the reason why a person contemplated in Rule 25 cannot represent the applicant party, which includes affordability, if applicable;
- the ability of the proposed representative to meaningfully represent the applicant; (e.g. level of knowledge and skills in this area of the law);
- whether the proposed representative is subject to the oversight and discipline of a professional or statutory body;

RELEVANT LEGISLATIONS

- Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration Government Gazette No 48445 (Approved 21 April 2023).
- Labour Relations Act 66 of 1995.

WHO MAY CHARGE A FEE IN ORDER TO REPRESENT PARTIES AT THE CCMA?

Rule 25(1)(f):

No person representing a party in proceedings before the Commission in a capacity contemplated in sub-rule (1)(a) [conciliation] or (b) [arbitration] other than a legal practitioner or candidate attorney may charge a fee or receive a financial benefit in consideration for agreeing to represent that party.

A legal practitioner or candidate attorney may not represent any party during conciliation including the conciliation part of a con-arb process.

Where a written agreement is signed by all parties consenting to legal representation, it has to be placed before the arbitrator to exercise his/her discretion to consent after considering the grounds which led the parties to consent on legal representation. Thus, the role of the arbitrator is not simply to "rubber-stamp" as that would take his/her discretion away.

DETERMINING WHETHER A PERSON QUALIFIES TO REPRESENT A PARTY IN TERMS OF THE RULES

If there is a dispute about whether a person qualifies to represent a party in terms of the Rules, the commissioner must determine the issue.

That representative may be required to show why he or she should be permitted to appear in the hearing.

Evidence that may need to be submitted includes, constitutions, pay slips, contracts of employment, documents and forms or recognition