

Heading to the CCMA during lockdown? Here is what you need to know

By Jaden Cramer and Jessica Van Den Berg 21h ago

Covid-19 level four regulations have allowed a number of industries and sectors to gradually resume operations.

On May 11, 2020 an urgent directive in respect of access to the Commission for Conciliation, Mediation and Arbitration (CCMA) came into effect, making provision for the way in which matters are to be enrolled, heard and the measures in place to ensure the requisite health and safety requirements are adhered during the lockdown.

The Covid-19 pandemic has had a severe impact on the economy resulting in job losses and retrenchments. It is important that individuals involved in employment and labour disputes have access to services provided by the CCMA.

See below full Q and A regarding the Directive

Are the parties able to refer disputes to the CCMA?

Parties will not be able to submit physical copies of referral forms to the CCMA, however, CCMA Rule 7 allows for service of such referrals to be made by email, as well as fax. The CCMA is currently working on alternative online platforms to be utilised for referrals which will be communicated once ready.

How will conciliation hearings be conducted?

Conciliation hearings which comply with the requirements of the Directive will be set down for a physical hearing, unless otherwise agreed between the Parties and the CCMA. Where possible, these will take place telephonically or through a digital online platform satisfactory to the CCMA or Commissioner and depending on what is available to all parties.

The parties and the CCMA can agree in writing to hold the hearing at an alternative venue.

Where the conciliation process could not take place within 30 days from the date of the referral and in the absence of an agreement between the parties to extend the 30 day period, the CCMA will issue a certificate of outcome in terms of section 135(5) of the LRA. The agreement to extend the 30 day period must be before the expiry of the 30 day period.

How will application proceedings be heard at the CCMA?

Applications will not be scheduled for oral hearings in an open hearing venue unless the CCMA or Commissioner directs otherwise. Application proceedings which cannot be dealt with by a way of written submissions will be dealt with by video conferencing facilities.

Where oral evidence is required but one or more of the parties cannot access electronic communication, the CCMA may direct that the matter be heard on a date where conditions compliant with COVID-19 Regulations and Directives allow, or in a way that the Commissioner may prescribe.

Where an application is made as a statement without a signature, the CCMA requires confirmation from the submitting party through electronic means that is not in the public domain such as SMS, WhatsApp, and voice recording or otherwise.

What should be discussed in the pre-arbitration conference?

Parties must hold a pre-arbitration conference to reach consensus on the issues listed in CCMA Rule 20(3). The Directive lists the following specific issues which must be dealt with:

- whether the parties are prepared to proceed with the arbitration at the employer's premises, subject to the COVID-19 Occupational Health and Safety Measures in Workplaces COVID-19 (C19 OHS), 2020;
- whether the parties are prepared to proceed by means of a video conferencing facility and the applicable facility to be used;
- the possibility of shorter periods of notice of set down;
- how evidence will be adduced remotely or if witnesses do not have access to video conferencing methods;
- the admission of evidence by affidavit or statement that may be confirmed, and
- any other information that the CCMA or Commissioner may require to determine how the matter is to be dealt with.

Any agreement reached in terms of the pre-arbitration conference must be recorded in writing and electronically submitted to the CCMA.

How will statements of case and answering statements be submitted?

The CCMA may, in terms of CCMA Rule 19, direct the requesting party to deliver a statement of case setting out legal issues arising from the material facts, and answering statements from the other party. Parties may be requested to agree on what oral evidence may be delivered by statement or by affidavit, which must be submitted electronically seven days prior to the scheduled date of the arbitration hearing.

The Commissioner may give ad hoc directives as to how the matter is to be disposed of, having regard to the arrangements the parties have made.

How will witnesses be secured?

Where parties require the presence of witnesses, who are entitled to administrative assistance in terms of section 115(2)(bA) of the LRA, a Commissioner may direct any party to be present and/or available on a time and date as determined by the Commissioner, where the commissioner is satisfied that the other requirements for a person to be served has been met.

Applications for subpoena may be served electronically in terms of CCMA Rule 37(5).

What are the health and safety related requirements for a physical hearing?

Where the CCMA may convene physical hearings in terms of the Regulations and Directives, anyone seeking access to the CCMA or other venue agreed upon must:

- submit for compulsory screening;
- wear a face mask;
- apply hand sanitiser; and
- adhere to applicable social distancing rules.

Only parties fewer than 10, and their representatives will be allowed to enter the CCMA buildings or other designated venues subject to the size of the venue. Representatives and parties required to travel to the CCMA or other venue, must comply with any applicable restrictions.

Objection to the physical hearing?

Any party objecting to physical hearing being conducted under the conditions described above, must submit a notice of objection and reasons in writing and serve same on the other party and the CCMA. After consideration and provision of alternatives, the Commissioner or a Provincial Senior Commissioner must decide whether the matter should proceed or be postponed.

What is the protocol applicable in video conferences?

For the purpose of maintaining order, the CCMA provides protocols to be followed, inter alia, ensuring that there is no ambient noise interfering with the audio quality of the hearing, participants to mute their microphone when not speaking.

Where the party hosting the video conference is called to do so, the party must record the session and submit the audio file to the CCMA along with a signed statement of confirmation that the recording has not been tampered with in any way.

How will the CCMA and parties communicate?

Communication between the Parties and the CCMA must be by email where such communication may be printed out to be copied or saved electronically.

What happens if the parties settle?

The terms of any settlement agreement reached must be recorded and sent to both parties to sign electronically and filed with the CCMA. Where the parties do not have access to an electronic signature, the parties and the Commissioner will agree on an applicable way to record this agreement.

How will the parties sign documents?

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

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