

**Commission for Conciliation, Mediation
and Arbitration**

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DIRECTOR'S OFFICE



15 October 2021

TO ALL: CCMA COMMISSIONERS

DIRECTIVE ON SECTION 138(5)(a) DISMISSAL AND RE-ENROLLMENT

1. PURPOSE

1.1 The purpose of this directive is to -

- 1.1.1 communicate the CCMA's position in the decision of the Labour Court in *Solomons v Food Lovers Market Kempton Park* handed down on 02 August 2021 relating to the interpretation and application of section 138(5)(a) of the Labour Relations Act 66 of 1996, as amended ("the LRA");
- 1.1.2 direct commissioners on the steps that must be taken when exercising discretion to dismiss matters at arbitration in terms of section 138(5)(a); and
- 1.1.3 direct commissioners on the steps that must be taken for processing applications for re-enrollment of matters after they have been dismissed (removed from the roll) in terms of section 138(5)(a).

2. BACKGROUND

2.1 The facts in the *Solomons* case are, briefly, that neither party was present at arbitration because the parties agreed in writing to postpone the matter. The commissioner was aware of this, but dismissed the matter in terms of section 138(5)(a) because the parties were not in attendance and the agreement to postpone was not in compliance with the CCMA's Rules. Clearly, the merits of the dispute were not decided. Another commissioner refused to rescind the "dismissal ruling". The Labour Court reviewed and set aside the refusal to rescind the dismissal ruling.

- 2.2 The Court held that the phrase “dismiss” in section 138(5)(a) is unfortunate because the grammatical meaning of the word “dismiss” is to adjudicate a cause of action as insufficient to proceed further in court because of some deficiency. The Court held further that it is not ordinarily appropriate for matters to be dismissed without determining the merits of the dispute.
- 2.3 The Labour Court likened the concept of “dismiss” in section 138(5)(a) to “striking the matter off the roll” or presuming it to be “withdrawn”. In such instances, a matter may be re-enrolled, subject to the rules of the relevant court. The CCMA is guided in this Directive by Rule 15 of the Labour Court Rules.¹
- 2.4 The CCMA’s primary function is to resolve labour disputes and, in the context of arbitration, commissioners are enjoined by section 138(1) to “determine the dispute fairly and quickly, *but must deal with the substantial merits of the dispute with the minimum of legal formalities*” (our emphasis).
- 2.5 Article 6 and 7 of the CCMA Guidelines on Misconduct Arbitration provides that the CCMA and all its commissioners are obliged to interpret and apply the Labour Relations Act and other legislation in accordance with decisions of the Constitutional Court, Supreme Court of Appeal, Labour Appeal Court, High Court and Labour Court. Commissioners must follow the interpretation placed upon a provision by the most recent binding decision of the highest court dealing with that matter.
- 2.6 In the premises, dismissal of a matter in terms section 138(5)(a) of the LRA is provided for unless and until the section is amended or repealed. However, the meaning of the section, as interpreted in *Solomons*, is that the matter is “removed from the roll” or considered “withdrawn” and the matter is capable of being re-enrolled once a satisfactory explanation is provided for the absence from arbitration.
- 2.7 A decision in terms of section 138(5)(a) is the performance of a statutory power, essentially an administrative act. A decision in terms of section 138(5)(a) is not a ruling and there is no scope for an application for rescission in terms of section 144 of the LRA.

¹ Rules for the Conduct of Proceedings in the Labour Court.

3. DIRECTIVE

CCMA Commissioners are hereby directed as follows:

- 3.1 If the referring party fails to attend arbitration, including the arbitration part of con-arb, the commissioner appointed to arbitrate must attempt to establish the reason for non-attendance.
- 3.2 If there appears to be good reason for the absence, the commissioner must record the reason on the file and direct that the matter must be rescheduled for arbitration.
- 3.3 If the absence is, on the face of it, **wilful or unexplained**, or the commissioner does not accept the explanation, the commissioner may exercise discretion in terms of section 138(5)(a) to dismiss the matter and the matter will be removed from the roll.
- 3.4 The commissioner must complete the prescribed form (Annexure 1) which states that the matter is **removed from the roll** and that the referring party that was absent may request that the matter be re-enrolled in accordance with the prescribed procedure.
- 3.5 The CCMA must inform the parties that the matter is removed from the roll by sending a copy of the decision to all parties.
- 3.6 The matter will be recorded as “abandoned” on the system and closed. This enables the case to be re-opened if the request for re-enrollment is granted and the matter is rescheduled for arbitration.
- 3.7 **A decision to dismiss in terms of section 138(5)(a) cannot be rescinded in terms of section 144 of the LRA read with Rule 30 of the CCMA Rules, as amended.**
- 3.8 The **prescribed procedure to request re-enrollment** is as follows:
 - 3.8.1 The referring party who was absent must complete and sign the prescribed form “Request for Re-enrollment” (Annexure 2) giving reasons for the absence. A signed written request is sufficient, and it is not necessary for the Request for Re-enrollment to be made on affidavit or commissioned.

- 3.8.2 A request for re-enrollment must be made within a reasonable time. The Request for Re-enrollment form requires the referring party who was absent to explain the steps taken to re-enroll the matter after the matter was removed from the roll.
- 3.8.3 The Request for Re-enrollment must be submitted to the Provincial Senior Commissioner or a delegated commissioner to decide whether the referring party (that was absent) has provided the CCMA with a satisfactory explanation² for the failure to attend arbitration³ and has taken reasonably timeous steps to have the matter re-enrolled.
- 3.8.4 The commissioner considering the Request for Re-enrollment may decide whether the matter should be re-enrolled on the papers only, without submissions from the opposing party and without the need for a hearing.⁴
- 3.8.5 The commissioner considering the Request for Re-enrollment must consider whether the absence was wilful.
- 3.8.6 The commissioner considering the Request for Re-enrollment must have regard to section 1, section 3 and section 138(1) of the LRA.
- 3.9 The CCMA must inform the parties of the Decision on the Request for Re-enrollment (Annexure 3). If the Request is granted, the case will be re-opened and rescheduled for arbitration. If the request is refused, the matter will remain closed on the CCMA Case Management System and there will be no further processing of the case other than, possibly, for purposes of a review application.
- 3.10 A Decision on the Request for Re-enrollment is not a ruling but an administrative act. Accordingly, there is no scope for an application for rescission in terms of section 144 and the only remedy for a party who is refused re-enrollment (usually the employee) is to apply for review in terms of section 158(1)(g) of the LRA.
- 3.11 If the party who had not referred the dispute to the CCMA (usually the employer) wishes to challenge the Decision on the Request for Re-enrollment, section 158(1B) would apply. This section provides that the Labour Court may not review any decision made during CCMA

² Good cause probably imposes a standard that may be too high, reasonable or satisfactory explanation seems to be more in keeping with the tenor of the judgment.

³ Based on Rule 15(1) of the Labour Court Rules.

⁴ Based on Rule 15(2) of the Labour Court Rules where such requests are considered in Chambers by the Judge.

conciliation or arbitration proceedings before the issue in dispute has been finally determined, except if the Labour Court is of the opinion that it is just and equitable to review the decision before the issue in dispute has been finally determined.

3.12 This Directive comes into effect from 15 October 2021.

Cameron Sello Morajane
CCMA DIRECTOR

ANNEXURE 1:

Section 138(5)(a) Dismissal: Matter Removed from the Roll



CASE NUMBER: _____

COMMISSIONER: _____

DATE: _____

In the matter between:

_____ [Employee / Applicant]

and

_____ [Employer / Respondent]

There was no appearance by the Referring Party / Both parties (*TICK*) at Arbitration (including the arbitration part of con-arb) at the scheduled time of commencement of _____ (time) on _____ 202__ (date) or after 30 minutes' grace period.

I am satisfied that the parties had proper notice of the date, time and place of the hearing. Proof of service is on the CCMA case file.

In the absence of an acceptable explanation for non-attendance, I hereby dismiss the matter in terms of **Section 138(5)(a)** of the **LRA, 66 of 1995** and the **matter is removed from the roll**.

The referring party that was absent may request that the matter be re-enrolled in accordance with the prescribed procedure by completing the *Request for Re-enrollment* form and submitting it to the CCMA as soon as is reasonably possible.

Signed at _____ on this _____ day of _____ 202__.

Commissioner's Signature: _____ Name: _____

ANNEXURE 2:



IN THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Case Number: _____

In the matter between

_____ [Employee / Applicant]

and

_____ [Employer / Respondent]

REQUEST FOR RE-ENROLLMENT

If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and had referred the dispute to the Commission, the matter may be dismissed in terms of section 138(5)(a) of the LRA or “removed from the roll”. The matter may not be re-enrolled without that party having provided the CCMA with a satisfactory explanation for the failure to attend the arbitration hearing.

PLEASE ENSURE THAT YOU COMPLETE ALL THE SECTIONS PROVIDED BELOW.

I, _____ (*name*) hereby request re-enrollment
of this matter for arbitration after it was removed from the roll on _____ (*date*).

1. On what date did you learn (find out) that the matter was removed from the roll?

2. Why were you absent from the arbitration hearing? (Give full reasons and attach any proof, e.g. medical certificate / accident report)

3. What steps have you taken to have the matter re-enrolled as soon as possible?

PLEASE CONFIRM YOUR CONTACT DETAILS IN THE SPACE PROVIDED BELOW:

Home Address or Address where you wish to receive correspondence from the CCMA (if different from your home address):

Contact telephone number: _____

Email address: _____

I (name and surname of the Applicant) confirm that the information that I have provided in this Request for Re-enrollment is accurate and I agree to supplement my explanation for non-attendance of the hearing should this be required by the Commission.

.....
SIGNATURE

.....
DATE

WHERE TO SEND THIS REQUEST FORM

The Request for Re-enrollment needs to be sent to the CCMA Office where the matter was scheduled for the hearing using the contact details for that CCMA Office as provided in the set-down notice.

ANNEXURE 3:

Decision on Request for Re-enrollment



COMMISSIONER: _____

CASE NUMBER: _____

DATE: _____

In the matter between

_____ [Employee / Applicant]

and

_____ [Employer / Respondent]

Whereas this matter was removed from the roll [dismissed in terms of section 138(5)(a)] and the referring party that was absent submitted a **Request for Re-enrollment**; and

Whereas I have considered the reasons for the absence from arbitration and whether steps to re-enroll the matter were taken within a reasonable time;

I have decided to:

Grant the Request for Re-enrollment Refuse the Request for Re-enrollment

My reason is briefly: _____

Signed at _____ on this _____ day of _____ 202__.

Commissioner's Signature: _____ Name: _____