

**Commission for Conciliation,
Mediation and Arbitration**

28 Harrison Street, Cnr Main Street,
Johannesburg Private Bag X096, Marshalltown,
2107

Telephone: (011) 377 6635

DIRECTOR'S OFFICE



Directive: 07 of 2023

Date Issued: 26 May 2023

TO: CCMA COMMISSIONERS

**DIRECTIVE ON SECTION 138(5)(a) OF THE LABOUR RELATIONS ACT 66 OF 1995, READ
WITH CCMA RULE 30 ON THE POWER OF A COMMISSIONER TO DISMISS A MATTER FOR
NON-ATTENDANCE AT ARBITRATION**

1. PURPOSE:

- 1.1. The purpose of this Directive is to direct how matters relating to section 138(5)(a) of the Labour Relations Act 66 of 1995 (LRA), read with CCMA Rule¹ 30, are to be dealt with by commissioners and the public.

2. CONTEXTUAL BACKGROUND:

- 2.1. The contextual background to this matter was previously dealt with under the *Directive on the Determination of Dismissals under section 138(5)(a) of the LRA* of 5 October 2021, and the subsequent amendments to CCMA Rules 30 and 32(2) and the inclusion of a new Rule 31C as published in *Government Gazette* 48445 of 21 April 2023.
- 2.2. The Directive and subsequent amendments to the CCMA Rules referred to in sub-paragraph 2.1 above, arose from the interpretation and application of the judgment of the Labour Court in **Solomons v Food Lovers Market, Kempton Park** handed down by Justice Moshoana on 02 August 2021.
- 2.3. In short, the Labour Court in **Solomons v Food Lovers Market, Kempton Park** provided that a decision taken by a commissioner in terms of section 138(5)(a) – the dismissal of a matter due to non-attendance of an arbitration hearing by the referring party - is an administrative act and should not be dealt with as a ruling. Justice Moshoana found that a commissioner may not dismiss such a matter,

¹ Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration.

but instead, may make an administrative decision to 'remove the matter from the roll.' In the circumstances, it was held that an applicant may request that the matter be re-enrolled, and rescission in terms of section 144 of the LRA would not apply.

2.4. In the Labour Appeal Court (LAC) judgment of **Mohube v CCMA & Others (JA18/2022)**, delivered on 18 May 2023, the LAC rejected the interpretation of section 138(5)(a) per **Solomons v Food Lovers Market, Kempton Park**. The LAC created new practice and procedures that must be adopted by parties and the CCMA in their application of section 138(5)(a) of the LRA and CCMA Rule 30.

2.5. Based on the findings of the LAC, I therefore issue the Directive set out below.

3. DIRECTIVE

3.1. The CCMA *Directive on the Determination of Dismissals under section 138(5)(a) of the LRA* of 5 October 2021 is repealed with immediate effect.

3.2. That commissioners have the power to dismiss matters in terms of section 138(5)(a) of the LRA. However, as per the LAC, commissioners are directed to utilise this power as a last resort.

3.3. In cases where a dismissal has been ruled, parties have a right to apply to have the ruling rescinded in terms of section 144 of the LRA read with CCMA Rule 32.

3.4. A ruling issued in terms of Rule 30 is a ruling contemplated in terms of section 144 of the LRA.

3.5. The CCMA will issue Guidelines within seven (7) working days of the date of this Directive on what factors may be considered when exercising the power to dismiss and on how to deal with matters that are pending in terms of the CCMA *Directive on the Determination of Dismissals under section 138(5)(a) of the LRA* of 5 October 2021 and Rules 30(1)(a) and (b), and 31C.

4. This directive is with immediate effect.



Cameron Sello Morajane
CCMA DIRECTOR