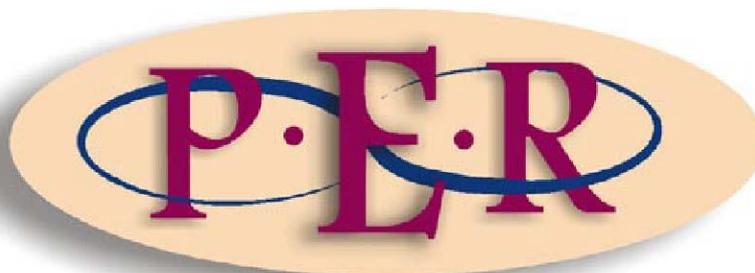


**Author: KJ Selala**

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**KJ Selala\***

## **1 Introduction**

This case note sets out to re-examine the problems associated with the issue of legal representation at arbitration proceedings of the Commission for Conciliation Mediation and Arbitration (CCMA). In the recent case of the *Law Society of the Northern Provinces v Minister of Labour*<sup>1</sup> (hereafter the *Law Society* case) the North Gauteng High Court, per Tuchten J struck down a rule of the CCMA which limited legal representation at proceedings of the CCMA as unconstitutional. Rule 25(1)(c) of the CCMA rules restricts legal representation by excluding legal practitioners from appearance as of right unless the complex nature of the case is such as to persuade the commissioner that the appearance of a legal practitioner is warranted or all parties and the commissioner consent to the appearance of the legal practitioner. In his judgment Tuchten J found that Rule 25(1)(c) is irrational and arbitrary. The basis of the irrationality of the rule, as Tuchten J determined, is rooted mainly in the fact of its inconsistency with section 3(3)(a) of the *Promotion of Administrative Justice Act* (PAJA).<sup>2</sup> Tuchten J noted that while section 3(3)(a) of PAJA empowers the administrator to exercise discretion to give a person whose rights are materially and adversely affected by administrative action an opportunity to obtain legal representation both in serious and in complex cases, Rule 25(1)(c) does not, as does section 3(3)(a) of PAJA, confer the discretion on the commissioner in a CCMA arbitration to afford the opportunity for legal representation in a serious but not

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\* Koboro J Selala. BIuris, LLB, LLM (UNIN). Lecturer, School of Undergraduate Studies, Northwest University, Mafikeng Campus. Email: 22013113@nwu.ac.za.

<sup>1</sup> *Law Society of the Northern Provinces v Minister of Labour* 2013 1 SA 468 (GNP) (*Law Society* case).

<sup>2</sup> *Promotion of Administrative Justice Act* 3 of 2000 (PAJA). Section 3(3)(a) of PAJA states: "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."

complex case of dismissal for misconduct or incapacity. In so deciding Tuchten J disagreed with an earlier decision of the Labour Appeal Court in *Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau NO*,<sup>3</sup> (hereafter *Netherburn Engineering case*) where the Labour Appeal Court found that the seriousness of a dismissal does not in itself justify the conclusion that the limitation of legal representation at CCMA is irrational. In the latter case Musi JA had found that section 140(1)<sup>4</sup> of the *Labour Relations Act* 66 of 1995 (LRA) was rational.<sup>5</sup>

This case note aims in the main to analyse critically the judgment of Tuchten J in the *Law Society* case and to consider its implications for labour dispute resolution in South Africa. Two factors in particular appear to have influenced the court in its decision: firstly, the reasons advanced by the respondents to justify the rule: and secondly the apparent discrepancy in wording between Rule 25(1)(c) and section 3(3)(a) of PAJA. The case note considers first if Tuchten J was correct in his approach to finding that Rule 25(1)(c) is irrational. Secondly, Tuchten J's finding that Rule 25(1)(c) is inconsistent with section 3(3)(a) of PAJA is considered. It is argued that while Tuchten J's findings in this matter may appear at first glance to be uncontroversial, a careful study of the judgment shows that the judgment was not properly considered, and leaves much to be desired. It is asserted that although our law does not recognise an absolute right to legal representation at labour proceedings, in the light of Tuchten J's judgment, it will not be easy to identify the circumstances that would provide justification for the infringement of the right to

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<sup>3</sup> *Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau* 2009 30 ILJ 269 (LAC) (*Netherburn Engineering case*).

<sup>4</sup> Before its repeal by s 28 of the *Labour Relations Amendment Act* 12 of 2002 (LRA), s 140(1) of the LRA provided as follows: "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 section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless -  
(a) the commissioner and all the other parties consent; or  
(b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering -  
(i) the nature of the questions of law raised by the dispute;  
(ii) the complexity of the dispute;  
(iii) the public interest; and  
(iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute."

<sup>5</sup> *Netherburn Engineering case* para 32 of Musi JA's judgment.

legal representation at CCMA arbitrations, and probably at internal disciplinary hearings as well. The case note does not enter the debate about whether or not legal representation is desirable at CCMA proceedings, but will note the profound implications of the judgment on the whole of labour dispute resolution in the country.

## 2 The facts and the decision of the Court

The Law Society of the Northern Provinces (the *Law Society*) brought an application to declare Rule 25(1)(c) of the rules of the CCMA unconstitutional.<sup>6</sup> The thrust of the Law Society's argument was that Rule 25(1)(c) is irrational and arbitrary. As the Law Society argued, the basis of the irrationality lies in the fact that Rule 25(1)(c) does not affect the rights conferred in Rule 25(1)(b)<sup>7</sup> in relation to the other categories of representatives but only legal practitioners as defined are affected. In its submission, the Law Society contended that there is no reasonable or constitutional rationale why only practising legal practitioners have a qualified right to appear in dismissal disputes involving conduct or capacity.<sup>8</sup>

The application was opposed by the Minister of Labour and the CCMA (hereafter the respondents). In their opposition, the respondents argued that the system within which the CCMA functions is the product of a negotiation by a variety of social and

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<sup>6</sup> Rule 25(1)(c) states: "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."

<sup>7</sup> Rule 25(1)(b) provides that 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 registered employer's organisation.

<sup>8</sup> *Law Society* case para 25.

legal partners.<sup>9</sup> They stressed that these negotiating partners had agreed that arbitration litigants should enjoy an unqualified right to legal representation in all arbitrations other than those concerning dismissals for misconduct or incapacity. The CCMA specifically argued that "it is inherent in the structure of the adjudication of disputes by the CCMA that disputes about whether individuals or groups of employees have breached company rules or are incapacitated to an extent that justifies their dismissal are less serious, are regulated by a detailed code of practice, and should be adjudicated swiftly and with the minimum of legal formalities".<sup>10</sup> However, Tuchten J was not impressed by this explanation, stating that dismissal is a serious matter. Although he remarked that in a great number of cases the employee's job will be his major asset, Tuchten J conceded that the evidence of the respondents concerning the nature of the system within which the CCMA functions was also compelling.<sup>11</sup> However, Tuchten J indicated that while he is mindful of the balance which must inevitably be present in our system of workplace dispute regulation, any such balances which are translated into legislation or administrative action must pass constitutional muster.<sup>12</sup>

Accordingly Tuchten J turned to consider the constitutional and legal framework pertaining to Rule 25(1)(c) of the CCMA rules. He compared the provisions of Rule 25(1)(c) with section 3(3)(a) of PAJA. He noted that while section 3(3)(a) of PAJA empowers the administrator to exercise discretion to give a person whose rights are materially and adversely affected by administrative action an opportunity to obtain legal representation both in serious and in complex cases, Rule 25(1)(c) does not, as does section 3(3)(a) of PAJA, confer the discretion on the commissioner in a CCMA arbitration to afford the opportunity for legal representation in a serious but not complex case of dismissal for misconduct or incapacity.<sup>13</sup> A plain consideration of these provisions compelled the court to conclude that Rule 25(1)(c) is inconsistent with the "*Constitution*" to the extent that it significantly abridges the discretion of the commissioner in a CCMA arbitration to afford the opportunity for legal

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<sup>9</sup> *Law Society* case para 28.

<sup>10</sup> *Law Society* case para 28.

<sup>11</sup> *Law Society* case para 28.

<sup>12</sup> *Law Society* case para 30.

<sup>13</sup> *Law Society* case para 39.

representation in a serious but not complex case of dismissal for misconduct or incapacity".<sup>14</sup> Tuchten J held that Rule 25(1)(c) also impermissibly trenches upon the discretion conferred by section 3(3)(a) of PAJA in relation to serious cases.<sup>15</sup>

Following up on the above analysis, Tuchten J considered the effect of the earlier judgment of the Labour Appeal Court in the *Netherburn Engineering* case on the case before him. In that case Musi JA had found that section 140(1) of the LRA was rational.<sup>16</sup> In an attempt to clarify this apparent contradiction, Tuchten J pointed out that these two cases are distinguishable. What distinguishes the two cases, as Tuchten J reasoned, was that in the *Netherburn Engineering* case, Musi JA was dealing with a statutory provision contained in national legislation, the *Labour Relations Act* (LRA),<sup>17</sup> the effect of which was that the provisions of section 3(3)(a) of PAJA were not required in that context to be observed.<sup>18</sup> As Tuchten J eloquently reasoned, had the substance of Rule 25(1)(c) been contained within the LRA itself, "there would have been room for the argument that the provision in the LRA was inconsistent with PAJA, with the consequence that there was no requirement that the LRA be read together with PAJA for present purposes".<sup>19</sup> But because, "as matters stand today, that is not the case, the result is that to achieve constitutional compliance, the impugned subrule must be consistent with both the LRA and PAJA".<sup>20</sup>

In the final analysis, Tuchten J declared Rule 25(1)(c) to be unconstitutional for want of rationality, but the order was suspended for 36 months to allow the CCMA to formulate a new rule. Tuchten J remarked, though, that his finding of constitutional invalidity in respect of Rule 25(1)(c) does not mean that the rules of the CCMA must provide for an unrestricted right to legal representation. On the contrary, he pointed out, both the common law as expressed in the case of *Hamata*

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<sup>14</sup> *Law Society* case para 39.

<sup>15</sup> *Law Society* case para 39.

<sup>16</sup> *Netherburn Engineering* case para 32 of Musi JA's judgment.

<sup>17</sup> *Labour Relations Act* 66 of 1995.

<sup>18</sup> *Law Society* case para 37.

<sup>19</sup> *Law Society* case para 16.

<sup>20</sup> *Law Society* case para 16.

*v Chairperson, Peninsula Technikon Internal Disciplinary Committee*<sup>21</sup> (hereafter *Hamata*) and section 3(3)(a) of *PAJA* confer a discretion on a commissioner in a CCMA arbitration.<sup>22</sup> However, as will be shown below, it is difficult to conceive of situations where the envisaged "new rule" would adequately regulate legal representation at the CCMA without taking away the discretionary powers conferred on commissioners.

### **3 Evaluation of and comment on *Law Society of the Northern Provinces v Minister of Labour***

This judgment raises at least two interrelated questions concerning the right to legal representation at labour proceedings. The first question relates to the constitutional status of the right - that is, whether the right to legal representation has, in the light of Tuchten J's judgment, assumed the status of an absolute right at these proceedings. The flip side of that question is whether or not the common law principle concerning legal representation at administrative tribunals has lost its relevance in labour disputes. The second question concerns the implications of the judgment on the future exercise of discretionary powers by presiding officers at disciplinary hearings or on the discretionary powers of CCMA commissioners to allow or deny legal representation in misconduct cases or unfair dismissal disputes. In other words, given the fact that a dismissal of an employee is a "serious matter", as Tuchten J determined, is it easy to conceive of a situation where the discretion would be exercised against allowing legal representation in misconduct cases or unfair dismissal disputes without rendering such a decision unconstitutional? These questions are fully considered below. Firstly, the Court's finding that Rule 25(1)(c) is irrational is critically analysed. Secondly, Tuchten J's interpretation of section 3(3)(a) of *PAJA* in relation to Rule 25(1)(c) is also examined.

There are also few other issues which give this case significance. These issues are highlighted later in this paper.

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<sup>21</sup> *Hamata v Chairperson Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 445 (SCA).

<sup>22</sup> *Law Society* case para 43.

### **3.1 The Court's finding that Rule 25(1)(c) is irrational**

#### *3.1.1 The Court's approach*

In his approach Tuchten J began by noting that "the best way to determine if a decision is rational is to examine it in the light of the reasons advanced to justify the decision".<sup>23</sup> But as soon as Tuchten J had set out this approach problems began to emerge. Firstly Tuchten J was confronted with the reality that the rationality or otherwise of the rule did not hinge on the mere explanations advanced by the respondents but was rooted in the LRA itself. Secondly, Tuchten J was also confronted with a situation concerning the decision of the Labour Appeal Court in the *Netherburn Engineering* case. In an attempt to circumvent these hurdles Tuchten J sought to decide the rationality question by looking at the construction of the impugned subrule in comparison with the relevant provision of PAJA. By taking this route Tuchten J jettisoned his initially intended approach and in the process evaded the main question of rationality. It is submitted that Tuchten J should rather have sought first to understand the rationale of the Rule 25(1)(c) with reference to the real reasons for the existence of the rule. These reasons are contained in both the Explanatory Memorandum of the draft LRA<sup>24</sup> and the LRA itself.

In the Explanatory Memorandum of the draft LRA Bill, the following was stated:<sup>25</sup>

Legal representation is not permitted during arbitration [concerned with dismissals for misconduct and incapacity] 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 business at a disadvantage because of the cost.

The need for expeditious, informal and affordable procedures that take place before accessible and specialist dispute resolution institutions has been accepted as the

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<sup>23</sup> *Law Society* case para 27.

<sup>24</sup> *Explanatory Memorandum of the Labour Relations Bill (1995) ILJ 278.*

<sup>25</sup> *Explanatory Memorandum of the Labour Relations Bill (1995) ILJ 278 319.*

underlying reason for the limitation of legal representation at the CCMA.<sup>26</sup> As Professor Van Eck noted, these reasons were also relied on when the CCMA and the Labour Court were established shortly after South Africa became a constitutional democracy in 1994.<sup>27</sup> Despite some strong views which had been expressed against the limitation of legal representation after the establishment of the CCMA, the restrictive measures have merited general approval.<sup>28</sup> In this regard, mention might be made of the failed attempts to declare the restrictive measures unconstitutional on one or more grounds including that of irrationality.

In *Norman Ntsie Taxis v Pooe NO*<sup>29</sup> an argument was raised suggesting that the rationale for excluding legal representation in certain arbitration proceedings had fallen away, and that the initial objectives recorded in the Explanatory Memorandum could no longer be used as a basis for determining the legitimacy of any exclusion or limitation of the right to legal representation in the CCMA.<sup>30</sup> In dismissing this argument Van Niekerk J indicated that the starting-point in any evaluation of "these submissions" is the nature and status of the CCMA.

The CCMA is not a court of law... Although the CCMA may make awards that may be financially onerous on the parties to arbitration proceedings and while the nature of arbitration proceedings before the CCMA may resemble that adopted in a civil court, the fact remains that the CCMA is an administrative agency, at most in some instances a statutory tribunal, which in the discharge of its various statutory functions is required, *inter alia*, to arbitrate and determine those disputes in respect of which it has jurisdiction.<sup>31</sup>

Similarly, Zondo JP, in dismissing the constitutional challenge against section 140(1) of the LRA, held in the *Netherburn Engineering case*:<sup>32</sup>

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<sup>26</sup> Benjamin 1994 *ILJ* 260; Van Eck 2012 *TSAR* 775.

<sup>27</sup> Van Eck 2012 *TSAR* 775. Benjamin, for example, held the view that there are strong indications that a high degree of legal representation "...would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in the favour of employers" (Benjamin 1994 *ILJ* 260).

<sup>28</sup> See, for example, Buirski 1995 *ILJ* 529, quoted in Collier 2003 *ILJ* 754.

<sup>29</sup> *Norman Ntsie Taxis v Pooe* 2005 26 *ILJ* 109 (LC).

<sup>30</sup> *Norman Ntsie Taxis v Pooe* 2005 26 *ILJ* 109 (LC) para 38.

<sup>31</sup> *Norman Ntsie Taxis v Pooe* 2005 26 *ILJ* 109 (LC) para 40.

<sup>32</sup> *Netherburn Engineering case* para 44 of Zondo JP judgment.

[T]o the extent that the Act provides for legal representation in certain arbitrations but does not treat arbitration proceedings relating to dismissals for misconduct equally or in the same way, there is justification for such limitation. Those cases in which the Act may be providing for a right to legal representation are different from cases of dismissal for misconduct. 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.

This view of Zondo JP was further buttressed in a separate but concurring judgment of Musi JA where it was held that if the exclusion of legal representation was meant to achieve the legitimate government purpose of providing for the speedy, cheap and informal resolution of disputes, then it made sense to confine it to the majority of the cases.<sup>33</sup>

It is important to mention that the dispute in the *Netherburn Engineering* case did reach the Constitutional Court which, unfortunately, declined the invitation to rule on the constitutionality of the repealed section 140(1) of the LRA.<sup>34</sup> The Constitutional Court pointed out that a ruling on the constitutionality of the repealed section 140(1) would have no relevance to the constitutionality of the CCMA Rule 25(1). As the Constitutional Court crisply put it, "the question of the constitutionality and meaning of CCMA rule 25 thus stands over for another day".<sup>35</sup>

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<sup>33</sup> *Netherburn Engineering* case para 43 of Musi JA judgment.

<sup>34</sup> *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2009 30 ILJ 1521 (CC).

<sup>35</sup> *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2009 30 ILJ 1521 (CC).para 13.

### 3.1.2 *The distinction between the Netherburn Engineering and the Law Society cases*

It has been said earlier that in his judgment Tuchten J sought to distinguish the *Law Society* case from the *Netherburn Engineering* case. However, given the sameness of the principle, which is the rationality of the exclusion of legal representation at CCMA arbitration, and the legal questions involved in both cases, this distinction is, with respect, too convenient and is hard to sustain. It is argued that given the test of rationality as enunciated in the various Constitutional Court judgments<sup>36</sup> referred to in the *Netherburn Engineering* case,<sup>37</sup> as entailing that there must be a rational connection between the challenged provision and the achievement of a legitimate government purpose, it makes little difference if the challenged principle, in this context the limitation on legal representation, is contained in a statute or a CCMA rule. In this respect, it is difficult to agree with the narrow distinction which Tuchten J sought to draw between the *Netherburn Engineering* case and the *Law Society* case. It is also both significant and startling that Tuchten J failed to consider any of the abovementioned authorities.

On a proper reading of his judgment, Tuchten J sought to question the wisdom of the drafters of the LRA for restricting legal representation at the CCMA but in the process disturbed a settled legal position.<sup>38</sup> This much appears from the following passage of the judgment:<sup>39</sup>

[I]t is in my view a fair conclusion that the several negotiating parties who participated in the deliberations that led to the enactment of the LRA came to a compromise solution in relation to legal representation at arbitrations which found its way into the now repealed ss 138(4) and 140(1) of the LRA and ultimately into subrules 25(1)(b) and (c). I am mindful of the subtle balances that must inevitably be present in our system of workplace dispute regulation. But of course any such balances which are translated into

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<sup>36</sup> *New National Party of SA v Government of the Republic of SA* 1999 3 SA 191 (CC) para 19; *Pharmaceutical Manufacturers of SA: In re Ex parte President of the Republic of SA* 2000 2 SA 674 (CC) para 85; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 74.

<sup>37</sup> *Netherburn Engineering* case para 43 of Musi JA judgment.

<sup>38</sup> This legal position is neatly captured in the *Netherburn Engineering* case paras 14-18 and 32.

<sup>39</sup> *Law Society* case para 34.

legislation or administrative action must pass constitutional muster. An administrator as that term is used in PAJA has a discretion under s 3(3)(a) to give a person whose rights are materially and adversely affected by administrative action an opportunity to obtain legal representation both in serious and in complex cases.

On this path Tuchten J found himself unable to avoid the temptation to attack Musi JA's judgment in the *Netherburn Engineering case*, as he stated:<sup>40</sup>

[T]he learned judge of appeal found that a commissioner could routinely determine before the arbitration started whether legal representation was appropriate. I respectfully disagree. It fairly frequently happens that a case which appears before it starts to be straightforward turns out to be complex. The learned judge further concluded that it was rational to make the distinction because dismissals based on misconduct and incapacity constitute by far the bulk of the disputes arbitrated by the CCMA. Again, I respectfully disagree. To identify one category of case *a priori* (by reasoning from assumed axioms) for different treatment irrespective of the merits of each individual case seems to me the essence of arbitrariness.

The inevitable consequence of this approach was that Tuchten J would find himself sitting as a court of appeal against the decision of the Labour Appeal Court in the *Netherburn Engineering case*. This approach is surely legally unbearable primarily because it offends the principle of *stare decisis*.<sup>41</sup> One might, of course, argue that Tuchten J was justified in questioning the logic in Musi JA's reasoning regarding the latter's conclusion that a commissioner could routinely determine before the arbitration started if a matter is complex or not. However, such criticism is hardly sustainable considering the informal nature of the CCMA process and the active participation of the parties before and during the arbitration hearing. In other words, the CCMA commissioner could always enquire informally from the parties what the salient issues of the dispute are and in the process be able to determine the proper route to follow, including whether or not to permit legal representation in the circumstances. Therefore, it would not be correct to assume that a commissioner cannot determine the complexity of a matter right at the beginning of the arbitration hearing.

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<sup>40</sup> *Law Society* case para 36.

<sup>41</sup> On the importance of the principle of *stare decisis* see Ncukaitobi 2012 *Acta Juridica* 148, and the authorities cited therein.

While legal representation is undoubtedly advantageous and desirable in any forum that resolves disputes by the application of law, it does not necessarily follow that legal representation before these forums is absolute.<sup>42</sup> This position was authoritatively clarified in *Hamata*, where the Supreme Court of Appeal held that there is no constitutional right to legal representation before tribunals other than courts of law.<sup>43</sup> Furthermore, as Musi JA perceptively noted in the *Netherburn Engineering* case, it cannot be said that parliament was not aware of the sorts of criticism raised against the limitation of legal representation at CCMA hearings when it passed the LRA.<sup>44</sup> In a similar spirit Langa CJ in a minority judgment in *Chirwa v Transnet*<sup>45</sup> sounded the following warning:<sup>46</sup>

[W]hile we may question [that] intention and may have preferred a legislative scheme that more neatly divided responsibilities between the different courts, that is not the path the legislature has chosen. We must be careful as a court not to substitute our preferred policy choices for those of the legislature. The legislature is the democratically elected body entrusted with legislative powers and this Court must respect the legislation it enacts, as long as the legislation does not offend the Constitution.

Although the case of *Chirwa v Transnet* did not deal with the same issues as those raised in the *Law Society* case, it is submitted that the warning sounded by Langa CJ therein is equally instructive to the present matter. Exclusion of legal representation at the CCMA is a policy issue which the courts cannot help but respect, as long as it does not offend the *Constitution*.<sup>47</sup> As will become apparent from the discussion below regarding the interpretation of section 3(3)(a) of PAJA, the restrictive measure contained in Rule 25(1)(c) does not, arguably, offend the *Constitution*.

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<sup>42</sup> *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 445 (SCA) para 11; *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* 2002 5 SA 449 (SCA) para 11; *Majola v MEC, Department of Public Works, Northern Province* 2004 25 ILJ 131 (LC).

<sup>43</sup> *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 445 (SCA) para 11.

<sup>44</sup> *Netherburn Engineering* case para 32 of Musi JA's judgment.

<sup>45</sup> *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC).

<sup>46</sup> *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) para 174.

<sup>47</sup> *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) para 174.

From the analysis of Tuchten J's reasoning concerning the question of the rationality of Rule 25(1)(c), it does appear that Tuchten J attached excessive weight to the enquiry about whether Rule 25(1)(c) was consistent with section 3(3)(a) of PAJA. This approach, it is respectfully submitted, contributed significantly to the Court's losing its necessary focus on the substantive issues to be considered in the judgment.<sup>48</sup> It is submitted that had Tuchten J sought to understand properly the rationale of Rule 25(1)(c) with reference to its historical background and also considered the practical implications of granting an absolute right to legal representation at the CCMA, he would surely not have arrived at the decision he arrived at. To this extent, it is submitted that Tuchten J should have approached the constitutionality of Rule 25(1)(c) with much more caution.

### ***3.3 The Court's finding that Rule 25(1)(c) is inconsistent with section 3(3)(a) of PAJA***

At the outset it is important to bear in mind that the CCMA rules were promulgated against the background of a particular regulatory scheme, namely that established by the LRA. Section 115(2A) of the LRA empowers the CCMA to establish rules to regulate practice and procedures during conciliation and arbitration proceedings.<sup>49</sup> Rule 25 in particular was introduced to deal with representation as contemplated by section 115(2A)(k).<sup>50</sup> These rules were intended not only to facilitate processes at CCMA but also, quite importantly, to advance the objectives of the LRA in so far as resolving disputes speedily, cheaply and informally.<sup>51</sup>

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<sup>48</sup> According to applicant's submissions, the main issue before court was the rationality of Rule 25(1)(c) of the CCMA Rules, the determination of which depended, in the words of Tuchten J, on the reasons advanced to justify the decision. However, it is interesting to note that in his judgment Tuchten J considered it unnecessary to consider the applicant's grounds of contention about the rationality of Rule 25(1)(c) in the light of his finding that Rule 25(1)(c) is inconsistent with section 3(3)(a) of PAJA. *Law Society* case para 42.

<sup>49</sup> See section 115(2A)(a) of the LRA.

<sup>50</sup> Section 115(2A)(k) of the LRA provides that the Commission may make rules regulating to - (k) the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings.

<sup>51</sup> See the *Explanatory Memorandum of the Labour Relations Bill* 1995 ILJ 278.

In order to determine if Tuchten J was correct in his finding that rule 25(1)(c) is inconsistent with section 3(3)(a) of PAJA, it is important to take a closer look at the construction of both provisions.

Section 3 of PAJA, in general, provides for minimum requirements of procedural fairness. Section 3(1) requires that all administrative action must, in order to be valid, be procedurally fair. Section 3(2)(b), in particular, provides for the following minimum requirements for procedural fairness:<sup>52</sup>

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons in terms of section 5.

Section 3(3)(a) provides for legal representation in certain instances. According to Plasket section 3(3)(a) comes in handy when the minimum requirements set out in section 3(2)(b) are insufficient to attain procedural fairness.<sup>53</sup> For this reason, administrators are granted discretion to allow a person to be assisted or legally represented, in serious or complex cases, to “present and dispute information and arguments” and to appear in person before the administrator concerned.<sup>54</sup>

As indicated earlier, in his judgment Tuchten J held that Rule 25(1)(c) is inconsistent with section 3(3)(a) of PAJA. He reasoned that while section 3(3)(a) of PAJA empowers the administrator to exercise discretion to give a person whose rights are materially and adversely affected by administrative action an opportunity to obtain legal representation both in serious and in complex cases, Rule 25(1)(c) does not, as does section 3(3)(a) of PAJA, confer the discretion on the commissioner in a CCMA arbitration to afford the opportunity for legal representation in a serious but not

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<sup>52</sup> On the analysis of s 3 of PAJA, see Plasket *Administrative Action* 9.

<sup>53</sup> Plasket *Administrative Action* 10.

<sup>54</sup> Plasket *Administrative Action* 10.

complex case of dismissal for misconduct or incapacity.<sup>55</sup> Implicit in this argument is the proposition that in the absence of the word "serious" in Rule 25(1)(c), Rule 25(1)(c) is inconsistent with section 3(3)(a) of PAJA. However, it is respectfully submitted that Tuchten J misread or alternatively failed to interpret the provisions of section 3(3)(a) of PAJA properly. Section 3(3)(a) of PAJA confers the discretion to allow legal representation in serious "or" complex cases. It is submitted that the use by the legislature of the word "or" in section 3(3) is not without significance. In other words, the word "or" in section 3(3)(a) may not be interpreted to mean, for example, "and". Literally interpreted, the word means what it means, that is, either one of the two. Also, it does not appear from the context that the legislator could have intended any other meaning than the simple dictionary meaning of the word. In *Commissioner, SARS v Executor, Frith's Estate*<sup>56</sup> the SCA pointed out that in the interpretation of a statute, the golden rule of interpretation of statutes is that where the meaning of words is clear the courts must give effect to their ordinary meaning. As the SCA in that matter also cautioned, this must, however, be done within the context of the statute. Given its interpretive importance, the word "or" in section 3(3)(a) of PAJA could surely not have been chosen by mistake. In contrast, Rule 25(1)(c) does not contain in its formulation both the words "serious" and "complex", but only "complex". Arguably, the lawmaker sought to distinguish the two provisions both in terms of meaning and purpose. This argument is fortified by what Musi JA stated in the *Netherburn Engineering* case.<sup>57</sup>

[I]n my view, the answer to the contentions around the gravity and complexity of individual unfair dismissal disputes, has been provided by the *amici curiae*. The issue is not the gravity of the consequences of the dismissal but rather the complexity thereof. This is so because dismissal will always entail adverse consequences for the employee, in particular. It is the nature and complexity of the issues, both of fact and of the law involved, whether the issues implicate the public interest and the comparative ability of the parties or their representatives adequately to deal with the issues that inform the decision whether to permit legal representation.

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<sup>55</sup> *Law Society* case para 39.

<sup>56</sup> *Commissioner, SARS v Executor, Frith's Estate* 2001 2 SA 261 (SCA) 273. See also *Poswa v Member of the Executive Council of Economic Affairs, Environment and Tourism, Eastern Cape* 2001 3 SA 582 (SCA) para 10.

<sup>57</sup> *Netherburn Engineering* case para 30 of Musi JA's judgment.

Considering the formulation of the two respective provisions, both in structure and purpose, it is fair to conclude that Rule 25(1)(c) is not inconsistent with section 3(3)(a) of PAJA. In the circumstance, it is again respectfully submitted that Tuchten J erred in finding that Rule 25(1)(c) is inconsistent with section 3(3)(a) of PAJA.

#### **4 Legal representation under common law and the *Constitution* in a nutshell**

Under common law, there is no general right to legal representation at tribunals other than courts of law. Numerous authorities supporting this principle are summarised and discussed by Buchner in his LLM thesis.<sup>58</sup> According to these authorities, the right to legal representation arises if the administrator in the exercise of his discretion considers it just and equitable to allow it.<sup>59</sup> As a general rule, the common law affords a party a fair opportunity to present his or her case (*audi alteram partem* principle). However, this does not necessarily imply that the right to legal representation is included within the framework of the *audi alteram partem* principle.<sup>60</sup>

For a variety of historical and, perhaps, political reasons the full rigour of the common law has been tempered by legislative and constitutional interventions which in diverse ways protect employees from untrammelled managerial power. As Marais JA percipiently observed in *Hamata*:<sup>61</sup>

[T]his constitutional and statutory position comes as no surprise. There has always been a marked and understandable reluctance on the part of both legislators and the Courts to embrace the proposition that the right to legal representation of one's choice is always a *sine qua non* of procedurally fair administrative proceedings. However, it is equally true that with the passage of the years there has been growing acceptance of the view that there will

<sup>58</sup> Buchner *Constitutional Right to Legal Representation* 23-37.

<sup>59</sup> See for example *Morali v President of the Industrial Court* 1986 7 ILJ 690 (C); *Lace v Diack* 1992 13 ILJ 860 (W); *Yates v University of Bophuthatswana* 1994 3 SA 815 (B); *Lunt v University of Cape Town* 1989 2 SA 438 (C); *Administrator, Transvaal v Zezile* 1991 1 SA 21 (A).

<sup>60</sup> *Dabner v SA Railways and Harbours* 1920 AD 583. See also Baxter *Administrative Law* 252, quoted in Buchner *Constitutional Right to Legal Representation* 36.

<sup>61</sup> *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 445 (SCA) para 11.

be cases in which legal representation may be essential to a procedurally fair administrative proceeding.

In the considered observation of O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>62</sup> in the current constitutional dispensation, the continuing relevance of the common law would have to be worked out on a case-by-case basis. Thus, in labour law, the continued vitality of the common law principle against the automatic right to legal representation is now manifested in both the LRA and PAJA, as illustrated by numerous decisions of our courts.<sup>63</sup> The argument was succinctly put by Musi JA in *Netherburn Engineering*, where he stated as follows:<sup>64</sup>

At common law the basic requirement for the conduct of proceedings before statutory bodies and domestic tribunals is that there must be conformity with the principles of natural justice to ensure procedural fairness. The issue of legal representation is regulated by whatever statute, regulation or rule that may be applicable, which may allow or preclude it. Where it is neither allowed nor prohibited, the tribunal has a discretion to allow it in appropriate circumstances. In short, there is no absolute right to legal representation...<sup>65</sup> Under the Constitution it is imperative to allow for flexibility so that tribunals are vested with a discretion to permit legal representation in appropriate circumstances where legal representation is necessary in order to ensure procedural fairness and that a rule that prohibits the exercise of a discretion cannot pass muster under the Constitution.

In a nutshell, the current legal position regarding legal representation is that there is no constitutional right to legal representation in labour proceedings. In these proceedings the presiding officers or CCMA commissioners are given latitude to

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<sup>62</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 22.

<sup>63</sup> *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* 2002 5 SA 449 (SCA) para 11; *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 445 (SCA) para 11; *Norman Ntsie Taxis v Pooe* 2005 26 ILJ 109 (LC); *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 BCLR 158 (CC). The adoption of the LRA in 1996 in particular introduced a new era in labour law. One of the stated aims of the new system is to give effect to the provisions of the *Constitution*. As Professor Van Eck (Van Eck 2012 *TSAR* 774) noted, with the LRA, policy-makers sought to limit the presence of legal representatives during specified labour dispute resolution processes. Indeed, as Wallis (Wallis 2005 *Law, Development and Democracy* 188) has also observed, "the acceptance of the common law and its rules in these areas does not mean that it reigns supreme over our labour law or that the LRA is subordinate to its dictates".

<sup>64</sup> *Netherburn Engineering* case para 15 of Musi JA's judgment.

<sup>65</sup> *Netherburn Engineering* case para 14 of Musi JA's judgment.

exercise their discretion to either allow or deny legal representation in accordance with the rules and the *Constitution*.

Be this as it may, already in *Lace v Diack and Others*,<sup>66</sup> Van Zyl J indicated that while the current position was that there was no absolute right to legal representation in our law, the time might well come when public policy might demand the recognition of such a right. Van Zyl J indicated that our law has not developed to the point where the right to legal representation should be regarded as a fundamental right required by the demands of natural justice and equity.<sup>67</sup>

## **5 The potential impact of the *Law Society* judgment on labour dispute resolution**

On a practical level, the *Law Society* case has the potential to significantly impact on labour dispute resolution in the country at large. If the inclusion of the word "serious" is what Tuchten J envisages in the "new rule" which the CCMA has been directed to redraft, then the implications will be far reaching, considering that all dismissal cases are serious. Any discretion against allowing legal representation at the CCMA, or disciplinary hearings for that matter, will be effectively eroded.

Although it is not certain at this stage what form the new rule would have to take to be constitutionally compliant, it is assumed that the CCMA would replicate the provisions of section 3(3)(a) of PAJA into the new rule. Considering what Tuchten J said about dismissal being a serious matter, the effect of this new rule would then be that the right to legal representation would be absolute in all unfair dismissal cases before the CCMA. This position would certainly be at odds with the vision and objectives of the drafters of the LRA, which were to make labour dispute resolution

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<sup>66</sup> *Lace v Diack* 1992 13 ILJ 860 (W).

<sup>67</sup> The case of the *Law Society* seems to suggest that the time referred to by Van Zyl J in *Lace v Diack*, when public policy might demand the recognition of the absolute right to legal representation has arrived. This can be inferred from Tuchten J's finding that dismissal is a serious matter and that Rule 25(1)(c) of the CCMA rules is therefore inconsistent with PAJA. Hence, with respect, Tuchten J's judgment does not support discretion for CCMA commissioners in unfair dismissal cases and cannot be claimed as authority for the view that there is no absolute legal representation at labour tribunals under South African law.

informal, speedier and cost-effective. Quite critically, Tuchten J's judgment would have effectively overruled the long-standing authority of the Labour Appeal Court,<sup>68</sup> the Supreme Court of Appeal<sup>69</sup> and the Constitutional Court<sup>70</sup> regarding the constitutional status of the right to legal representation at administrative tribunals. If the CCMA were to promulgate the new rule as directed by the court, the effect thereof would be felt not only by the CCMA but also by employers at large. As long as the seriousness of dismissal is viewed as critical, legal representation would be an absolute right which might not be denied under any circumstance. This would overlap with all serious misconduct cases at internal disciplinary hearings. The practical consequence would surely be something never envisioned by the drafters of the LRA and employers at large.

It is extremely unfortunate that on such an important issue as legal representation, Tuchten J did not fully appreciate the implications of his judgment on the entire labour dispute resolution system in the country. Arguably, of course, Tuchten J did pay some attention to the potential impact of his judgment on future dispute resolution by the CCMA in general, and the workload that would likely be created for the CCMA in particular. In this regard Tuchten J was quick to dismiss any such concerns holding that employees are entitled to assert their rights. "If by so doing a greater volume of work is generated for the CCMA, then the State is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated".<sup>71</sup>

As indicated earlier, Tuchten J suspended the order of constitutional invalidity for a period of 36 months to allow the CCMA to draft a new rule. The effect of this suspension is that until such time as the new rule is put in place, the current rule will continue to be in force. Theoretically speaking, the CCMA Commissioners should in the meantime continue to exercise their discretion to either allow or deny legal representation in unfair dismissal cases. It is, however, difficult to imagine how the

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<sup>68</sup> *Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau* 2009 30 ILJ 269 (LAC).

<sup>69</sup> *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 445 (SCA).

<sup>70</sup> *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 BCLR 158 (CC).

<sup>71</sup> *Law Society* case para 40.

commissioners would exercise such discretion against allowing legal representation in the face of Tuchten J's judgment.

## **6 The significance of *Law Society of the Northern Province v Minister of Labour***

It is widely accepted that the right to legal representation is an essential right in any legal system that prides itself on being fair and democratic. In this respect the *Law Society* case reinforces the importance of lawyers in a constitutional democracy.<sup>72</sup> Indeed, as argued by Buirski some years ago, the ability of a lawyer to delineate what may otherwise be a complex legal and factual issue and his role in acting as a check on the administrative process should never be underestimated.<sup>73</sup>

It is also worth noting that Tuchten J's judgment raises an important policy consideration that points in favour of a finding that legal representation must be absolute. Admittedly though, however desirable legal representation may be, it is not the path chosen by the legislature or the drafters of the LRA. And as argued earlier, it could not have been the intention of the lawmaker to grant absolute right to legal representation at CCMA arbitration in misconduct and incapacity disputes considering the applicable legal framework and the rationale for that decision as shown above.

At the end of the day it is a question of policy; the legislature will have to weigh the disadvantages of prohibiting legal representation with the alleged advantages of cheap, non-legalistic and expeditious proceedings.<sup>74</sup>

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<sup>72</sup> On the importance of representation in general see Grogan *Dismissal* 238.

<sup>73</sup> Buirski 1995 *ILJ* 529.

<sup>74</sup> Buchner *Constitutional Right to Legal Representation* 58.

## 7 Conclusion

In the foregoing discussion it has been shown that the decision of the court in *Law Society v Minister of Labour* is controversial. The analysis of the judgment reveals that the discretion vested in the CCMA commissioners to permit or deny legal representation to a party in an unfair dismissal dispute has indeed been taken away and that such a party is entitled as of right to legal representation regardless of whether anyone objects or not. Although this note is critical of the court for not appreciating the practical implications of its judgment on the operations of the CCMA and labour dispute resolution at large, it is not suggested here that the judgment is wholly amiss. Although not the best of judgments, Tuchten J's decision in *Law Society* has set a precedent and arguably opened the door for South African courts to develop the existing right to representation properly.

It is also evident from the foregoing discussion that the right to legal representation at administrative tribunals is an evolving area of law. In spite of the failure of the drafters of the *Constitution* to include the right in the *Constitution*, the courts are recognising that in certain specific circumstances legal representation at administrative tribunals may be necessary to ensure that the principles of fundamental justice are respected. However, while the right to legal representation may be crucial in underpinning broad structures of employee representation at either the CCMA or a domestic disciplinary hearing, legal representation, in itself, is not guaranteed to moderate the outcomes of the enquiry.

In conclusion, it all boils down to the interpretation of section 3(3)(a) of PAJA against Rule 25(1)(c) of the CCMA rules. What and how the amended or new Rule 25(1)(c) will look like, and whether it will adequately protect the constitutional rights of parties remains to be seen.

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### List of abbreviations

BCLR	Butterworths Constitutional Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
PAJA	Promotion of Administrative Justice Act
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
SCA	Supreme Court of Appeal