

The Consequences of a Failure to Attend Proceedings at the Commission for Conciliation, Mediation and Arbitration (CCMA)

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INTRODUCTION

South African labour law seeks to strike a balance between protecting the rights of employees and guiding the responsibilities of employers. However, certain procedural rules governing proceedings before the Commission for Conciliation, Mediation and Arbitration ("CCMA") may be perceived as prejudicial to employers - particularly, in instances where an employer, without good cause, fails to attend a conciliation or arbitration hearing before the commissioner.

FAILURE TO ATTEND CONCILIATION: RULE 13(1)

According to Rule 13(1) of the CCMA Rules, where a party does not attend a scheduled conciliation hearing, the commissioner has three options:

1. To continue with the conciliation proceedings in the absence of the non-attending party. This is known as 'proceeding in absentia,' where the commissioner may continue with the conciliation in the absence of the employer. In most scenarios, it will be impossible to conciliate without the counterparty and, as such, the proceedings will then usually conclude by issuing the certificate of non-resolution (per point 3 below).
2. The commissioner may adjourn the proceedings to a later date, provided that it still falls within the 30-day conciliation period as prescribed by statute; or
3. To conclude the proceedings by issuing a certificate stating that the dispute remains unresolved.

In exercising this discretion, the commissioner must consider several aspects, including:

1. Whether the party has failed to attend previous conciliation hearings in relation to the same dispute;
2. The reason (if any) provided for the failure to attend;

3. Whether effective conciliation is possible without the presence of both parties;
4. The potential prejudice to the attending party; and
5. Any other relevant factors.

Therefore, the consequences for either party failing to attend conciliation proceedings carries no legal repercussions thus rendering participation entirely voluntary, as parties cannot be compelled to attend.

CON-ARB PROCEEDINGS: RULE 17(4)

'Con-arb' is the process where conciliation and arbitration are scheduled to take place on the same day, one after the other. If a party fails to attend a con-arb hearing, Rule 17(4) of the CCMA Rules prescribes the following:

1. The commissioner must proceed with conciliation on the scheduled date, even if a party has submitted a notice of objection;
2. If no valid objection to con-arb was raised, or if the dispute remains unresolved after conciliation, the commissioner must proceed with arbitration immediately; or
3. Despite this, the commissioner retains discretion under section 138(5) of the Labour Relations Act 66 of 1995 (**LRA**), to adjourn the proceedings to a later date, if necessary.

ARBITRATION PROCEEDINGS: RULE 30 AND SECTION 138(5) LRA

When a party fails to attend arbitration proceedings, Rule 30 and section 138(5) of the LRA become relevant. If the referring party is absent, the commissioner must first attempt to determine the reason for such absence. If a valid reason exists, the matter may be rescheduled. However, if the absence appears to be deliberate or unjustified, the commissioner may remove the matter from the roll.

Nevertheless, if the non-referring party is absent, the commissioner may either proceed with arbitration in their absence or postpone the proceedings to a later date.

Before making any decisions, the arbitrator must be satisfied that the absent party was properly notified of the date, time, and venue of the proceedings.

The consequences for the employer where he fails to attend an arbitration hearing at the CCMA, will have adverse effects, as the burden of proof lies with the employer to prove that the dismissal was both substantially and procedurally fair. Without this opportunity, the perspective of the employee will be favoured by the arbitrator.

If the employer is absent from the hearing, the arbitrator will only postpone or reschedule the arbitration if there is a valid reason for the absence.

CONCLUSION

The CCMA provides flexibility in handling cases where one party fails to attend, balancing procedural fairness with the need to resolve disputes efficiently. However, parties should be aware that non-attendance without good cause may result in adverse outcomes, including the dismissal of a case or a ruling made against them.

It is always advisable for parties to attend any proceedings at the CCMA or, where attendance is not possible, to communicate timeously and clearly with the commissioner and provide valid reasons for their absence.



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