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<b>Citation</b>	(2019) 40 ILJ 2658 (MIBCO)
<b>Case No</b>	MIPT27810
<b>Court</b>	Motor Industry Bargaining Council
<b>Judge</b>	Stapelberg, Arbitrator
<b>Heard</b>	February 18, 2019
<b>Judgment</b>	February 18, 2019
<b>Counsel</b>	Not supplied
<b>Annotations</b>	No annotations to date

**Flynote : Sleutelwoorde**

*Bargaining council—Arbitration proceedings—Representation of parties—Legal representation—Whether arbitrator retaining discretion to consider application for legal representation in light of Legal Practice Act 28 of 2014—Section 25 of Legal Practice Act entitling legal practitioner to appear at any forum subject to other law—LRA 1995 not dealing with legal representation and DRC Rules subordinate legislation, not law—Arbitrator not having discretion—Legal representation permitted as of right.*

*Representation—Legal representation—Bargaining council arbitration proceedings—Whether arbitrator retaining discretion to consider application for legal representation in light of Legal Practice Act 28 of 2014—Section 25 of Legal Practice Act entitling legal practitioner to appear at any forum subject to other law—LRA 1995 not dealing with legal representation and DRC Rules subordinate legislation, not law—Arbitrator not having discretion—Legal representation permitted as of right.*

**Headnote : Kopnota**

The applicant employee referred a dispute to the Dispute Resolution Centre for the Motor Industry Bargaining Council (DRC). At the ensuing arbitration he was represented by his attorney, who contended that s 25 of the Legal Practice Act 28 of 2014 gave him right of appearance, subject to any other law. As the LRA 1995 did not in fact deal with legal representation and the DRC Rules did not constitute 'law', he was entitled to represent the employee at arbitration as a matter of right. He argued in the alternative that the matter was legally complex in that the employee was found guilty of both the main charge and alternative charge and would need to address both historical and contemporaneous inconsistency, both of which required legal expertise. The employer opposed the application and argued that the correct test for whether or not legal representation was warranted was as per the DRC Rules, and not

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the Legal Practice Act. He disputed that the matter was factually or legally complex and disagreed that legal representation was warranted.

The arbitrator confirmed that prior to the promulgation of the Legal Practice Act, he had a discretion to determine whether or not to grant legal representation at the council. However, s 25 of the Legal Practice Act granted a right of appearance to any legal practitioner, 'subject to any other law'. The LRA 1995 had not been amended to address this right and the rules promulgated by the council were subordinate to Acts of parliament, and hence the arbitrator concluded that he lacked the discretion to restrict the employee's right to legal representation, regardless of the nature of the dispute to be arbitrated. He concurred with the employee that he was entitled to legal representation as a matter of law.

The arbitrator upheld an application for legal representation.

**Cases Considered****Annotations:**

Commission for Conciliation, Mediation & Arbitration & others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal) 2014 (2) SA 321 (SCA); (2013) 34 ILJ 2779 (SCA) (followed)

Homoyi and Harrogate Projects CC (2015) 36 ILJ 1957 (CCMA) (referred to)

**Statutes Considered**

Legal Practice Act 28 of 2014 s 25

**Judgment**

Stapelberg, Arbitrator

*Details of hearing and representation*

[1] The matter was set down for an arbitration and was heard on 4 February 2019 at the DRC's Hatfield offices. The applicant was accompanied by J Geldenhuys (attorney) and the respondent was represented by J Dickinson (AHI). No interpreter was required and the matter was heard in Afrikaans and English.

*Summary of submissions*

[2] Mr Geldenhuys for the applicant submitted that s 25 of the Legal Practice Act 28 of 2014 gives an attorney the right of appearance at any court, tribunal or board, subject to any other law. The only other law is the LRA and the LRA in fact does not deal with legal representation. A bargaining council's rules are not law and hence he argued that he was not prevented from representing the applicant.

[3] He then argued, in the alternative, an application for legal representation as set out in the DRC Rules, referring to the fact that charges

were duplicated which was not an argument a layperson like the applicant could address on his own. The applicant was also found guilty on both the main charge and the alternative, the legal complexity of which he could not argue on his own. Furthermore, there had been both contemporaneous and historical inconsistency in the application of the rule, which the applicant also could not deal with on his own.

[4] Mr Dickinson for the respondent submitted that the rules are simple and there are no technical or legal issues to deal with. In terms of the prevailing case law, it remains clear that the commissioner has a

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discretion whether to permit legal representation or not. The matter is being heard under the auspices of the DRC and therefore the DRC rules remain applicable. He indicated that he did not wish to attempt to interpret new legislation that may be in conflict with this.

#### *Analysis of submissions*

[5] The respondent's representative is correct that the prevailing case law at present, even as far as the Supreme Court of Appeal, is *Commission for Conciliation, Mediation & Arbitration & others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal) 2014 (2) SA 321 (SCA)*; (2013) 34 ILJ 2779 (SCA) which confirmed the validity and constitutionality of the CCMA's rule 25 (which also extends to bargaining council rules, such as the DRC's rule 26) and the discretion of the commissioner in deciding whether to allow legal representation or not. However, this was before the Legal Practice Act came into effect on 1 November 2018.

[6] Section 25 thereof pertains to the 'Right of appearance of legal practitioners and candidate legal practitioners'. Subsection (2) thereof reads that 'a legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law'. Subsection (5) grants similar rights to candidate attorneys.

[7] In his ruling reported in *Homoyi and Harrogate Projects CC (2015) 36 ILJ 1957 (CCMA)*; [2015] 6 BALR 672 (CCMA), Commissioner G S Jansen van Vuuren had the foresight to point out the following with regard to the Legal Practice Act (which was by then not yet promulgated) in para 8:

'The Legal Practice Act of 2014 may, interestingly, change the current position because s 25(2) of that Act provides that "a legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law". ... These provisions have not yet come into operation, but it will be interesting to monitor developments in this regard because an Act of parliament will obviously enjoy preference over the commission's rules.'

[8] The LRA and other labour legislation applicable to CCMA and bargaining council commissioners has not been amended in response to the Legal Practice Act becoming law; it therefore appears that no provision has been made in the applicable legislation for the status quo (pre 1 November 2018) to continue to ensure that commissioners would retain a discretion in respect of whether to allow legal representation before the CCMA and bargaining councils. Rule 25 of the CCMA Rules and rule 26 of the DRC Rules, which sought to restrict the right to legal representation in cases of dismissal for conduct or capacity, are subordinate to Acts of parliament such as the Legal Practice Act, and can no longer serve to restrict legal representatives, excluding candidate attorneys from appearing in any proceedings, regardless of the nature of the dispute. Based on these considerations and considering that I am required to apply the law

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and not make the law, there is no discretion to restrict the applicant's right to legal representation, regardless of the nature of the dispute to be arbitrated and I therefore have to uphold Mr Geldenhuys' primary argument in that regard.

#### *Ruling*

[9] Having considered the submissions on the matter, I find that both parties have a right to legal representation without having to make an application, as this right is granted to legal practitioners in terms of the Legal Practice Act 2014, which takes precedence over the collective agreements and rules of the DRC.

[10] In spite of the case law that applied until 1 November 2018, there is no new legislation to restrict these rights and therefore there currently no longer exists a discretion for a commissioner to consider whether to permit legal representation in certain types of arbitrations.

[11] Case management is to schedule the matter for arbitration.