



(1) Reportable: NO  
(2) Of interest to other Judges: Yes

05 June /2026  
Signature Date

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**Case no: 2026-096502**

In the matter between:

**FRANK MALULEKA**

**Applicant**

and

**NATIONAL HEALTH LABORATORY  
SERVICES**

**First Respondent**

**CCMA - JOHANNESBURG**

**Second Respondent**

**COMMISSIONER ALLAN KAYNE N.O.**

**Third Respondent**

**Summary:** (Urgent application to review a ruling on legal representation in a misconduct dismissal case – consideration of Rule 25(1)(c) of the CCMA Rules and s 145(1B) of the Labour Relations Act- application for legal representation based on medical grounds – Clear right not established)

**JUDGMENT**

**LAGRANGE, J**

## Introduction

[1] This is an urgent application to review and set aside a ruling by an arbitrator presiding in an unfair dismissal for misconduct case. On 13 April 2026, the arbitrator refused to admit legal representation on medical grounds. On 11 December 2025, Maluleka had previously unsuccessfully applied for legal representation. On that occasion he sought to rely on the provisions of CCMA Rule 25 which permit exceptions to the prohibition against legal representation in misconduct dismissal cases, on certain grounds<sup>1</sup>.

## Factual background

### *The first ruling on legal representation*

[2] To contextualise the present application, it is necessary to briefly detail the first unsuccessful application for legal representation.

[3] The arbitration proceedings were initially scheduled for hearing on 28 November 2025. On that date, the Applicant did not attend the arbitration proceedings due to ill health, and the matter did not proceed. During that sitting, the Applicant, through his legal representative, made an application to be granted legal representation in the arbitration proceedings. As mentioned, the arbitrator refused the application on 11 December 2025.

[4] The Commissioner found that the dispute was not complex in either a factual or legal sense. The matter involved a straightforward determination of whether the

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<sup>1</sup> Viz: 'Rule 25 (1)(c) Restriction on legal representation

*If the dispute being arbitrated is referred in terms of section 69(5), 73 or 73A of the Basic Conditions of Employment Act, or 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, a party is not entitled to be represented by a legal practitioner or a candidate attorney in the proceedings unless—*

*(i) the commissioner and all the other parties consent; or*

*(ii) 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.'*

alleged misconduct had occurred and whether the Applicant had breached an instruction. The primary factual allegation is that the Applicant disclosed a confidential Special Investigating Unit (SIU) report to an individual who was implicated in that report. It was alleged Maluleka had previously been given a direct instruction not to disclose the contents of the report to any third party without prior approval, but nevertheless he did so in contravention of that instruction. The arbitrator was of the view that the case turned largely on factual issues and did not raise any novel or complicated legal questions. He expressly stated that he was unconvinced that there were any questions of law requiring legal representation.

- [5] The arbitrator also noted that the Applicant was himself legally trained, having been admitted as an advocate in 2005. Although the employer's representative also possessed legal qualifications, the arbitrator observed that any disparity between the parties was not such as to justify the granting of legal representation. Indeed, if anything the Applicant's legal training and experience placed him in a position adequately to present his case without the need for legal representation.
- [6] The arbitrator rejected the submission that legal representation was required because the disciplinary proceedings had involved legal representatives and an evidence leader for the employer. He rejected this as a basis for allowing legal representation at arbitration, holding that to do so would merely perpetuate complexity that had already been introduced at the disciplinary stage. In his view, arbitration proceedings should not adopt an unnecessarily legalistic or adversarial character where the dispute itself did not warrant it.
- [7] Having regard to all these factors, the Commissioner concluded that legal representation was not necessary for the fair determination of the dispute. He found that granting such representation would serve only to complicate what was otherwise a relatively simple dismissal dispute.

#### *The second ruling on legal representation*

- [8] The arbitration was rescheduled for 26 January 2026, but again postponed due to Maluleka's ill health, and ultimately came before the arbitrator on 30 and 31

March 2026, when a second application for legal representation had to be considered.

[9] This time, the application was premised on medical grounds, in contrast to the first application which had been based on the test set out in Rule 25. The Laboratory also opposed this application.

[10] The application was supported by a medical report dated 3 March 2026 prepared by a clinical psychologist, Dr Boitumelo Shayi, who recorded that the Applicant was experiencing psychological distress and recommended that he be supported by a representative during the arbitration proceedings given his compromised mental state. The application was only served on 26 March 2026 a few days before the arbitration was to resume, ostensibly because of the difficulty of getting the psychologist to sign a confirmatory affidavit. No explanation was provided why the medical grounds for this application only came to light in March and were not evident at the time the first application was brought.

[11] The psychologist reported that Maluleka was experiencing significant psychological distress characterised by symptoms of anxiety and depression. These conditions might impair both his emotional state and cognitive functioning. In practical terms, the psychologist indicated that these impairments could compromise Maluleka's ability to represent himself effectively in the CCMA proceedings. In particular, the report stated that his condition might affect his ability to provide clear and coherent testimony.

[12] The respondent opposed the application on multiple grounds. First, it argued that the application was fatally defective due to non-compliance with Rule 31 of the CCMA Rules, in that it was filed late without any accompanying application for condonation, despite Maluleka having been aware of the hearing date well in advance. Secondly, it contended that medical incapacity was not one of the factors listed in Rule 25 governing legal representation and therefore was not a relevant consideration. Thirdly, the respondent attacked the evidential value of the psychologist's report, arguing that it amounted to hearsay because it was not properly confirmed, and even if considered, it did not establish that Maluleka was incapable of representing himself. The respondent further

suggested that Maluleka's conduct reflected a lack of *bona fides* and an attempt to delay the proceedings, particularly given that he was present at the hearing and able to participate. Finally, it invoked the doctrine of *functus officio*, submitting that the previous ruling refusing legal representation was final and binding, and could not be revisited.

### The Arbitrator's Reasoning

[13] In analysing these submissions, the arbitrator first addressed the procedural objection relating to lateness. Although he expressed reservations about the adequacy of the explanation for the delay, he relied on Rule 31(10), read together with section 138 of the Labour Relations Act, to affirm his broad discretion to determine applications in a manner he considered appropriate in order to deal with the substantial merits of the dispute fairly and expeditiously. He emphasised that fairness is the primary consideration in CCMA proceedings and accordingly decided to entertain the application on its merits despite its procedural deficiencies.

[14] The arbitrator then considered the argument based on the *functus officio* principle. He accepted that, in general, once a decision-maker has made a final ruling, he or she is ordinarily precluded from revisiting it, in order to promote finality and legal certainty. However, he qualified this principle by observing that in the context of arbitration proceedings, it is not uncommon for multiple applications of a similar nature to be brought at different stages, and that where a subsequent application is based on materially different facts or circumstances, it does not offend the principle of *functus officio* to consider it afresh. He accordingly found that the present application, being grounded in new medical evidence rather than the factors previously advanced, was properly before him for determination.

[15] Turning to Rule 25(1)(c), the arbitrator noted that legal representation is not permitted in misconduct or incapacity dismissal disputes unless specific conditions are met. These include consent or a finding that it would be unreasonable for a party to proceed unrepresented, having regard to factors such as complexity, legal issues, public interest, and comparative ability.

- [16] Relying on authority from the Supreme Court of Appeal<sup>2</sup>, he held that these factors are not exhaustive and that other relevant considerations may be taken into account. This opened the possibility that medical or psychological factors could be considered in assessing whether legal representation is warranted.
- [17] The arbitrator subjected the psychologist's report to careful scrutiny. He distinguished between a medical certificate establishing incapacity to attend proceedings and a medical report making recommendations on legal representation. He held that the latter cannot be accepted without question and must be properly tested. In this case, the report was found to have limited evidential value because it was not properly confirmed by the psychologist under oath. Further, the confirmatory affidavit merely confirmed Maluleka's version rather than the report itself, and the delay in filing the application undermined its credibility.
- [18] Even if he accepted the report at face value, the arbitrator found that it did not establish incapacity. The report indicated only that Maluleka's condition *may* compromise his effectiveness and recommended legal representation be provided as "support", rather than demonstrating how his condition prevented him from representing himself.
- [19] He further noted that Maluleka was present and able to participate in proceedings and there was no indication he could not testify. He also noted Maluleka already had access to an attorney outside the strict confines of representation.
- [20] The arbitrator emphasised that, if Maluleka's condition genuinely impaired his ability to proceed, a postponement remained available. He considered this a more appropriate remedy than granting legal representation, given the CCMA's preference for informality and limited legal intervention. The applicant argued that this reasoning was contradictory, because it conceded that he might be too ill to participate, but refused legal representation on the basis he was able to participate.

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<sup>2</sup> *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* [2013] 11 BLLR 1057 (SCA); 2014 (2) SA 321 (SCA); (2013) 34 ILJ 2779 (SCA) at paragraph 21.

[21] In conclusion, the arbitrator held that Maluleka had failed to demonstrate that it would be unreasonable to expect him to proceed without legal representation. He therefore exercised his discretion to refuse legal representation.

### Evaluation

[22] Given that the arbitration was due to resume on 25 May, I accept that there was a need to launch the application on an expedited basis, assuming for the time being Maluleka has a clear right to representation. Unfortunately, owing to a number of other pressing urgent applications it was not possible to hand down judgment before then.

[23] In effect this is an urgent application for final relief. Accordingly, Maluleka must demonstrate a clear right to the relief sought, actual harm or a well grounded apprehension of harm and the absence of a satisfactory alternative remedy.

*Is it appropriate for the court to intervene at this juncture in the arbitration?*

[24] The primary question is whether this application should be entertained at all. In 2014 a new provision was added to s 145 of the Labour Relations Act, 66 of 1995, expressly restricting the power of the court to review rulings in part-heard arbitration proceedings, viz:

*‘(1B) The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.’*

[25] Thus, only if it is just and equitable may the court review an interlocutory decision. In interpreting the scope for intervention on such grounds under section 145(1B), in *South African Cabin Crew Association obo Members and another v South African Airways (SOC) Ltd and others*<sup>3</sup> the Labour Appeal Court affirmed the dictum in *South African Broadcasting Corporation (SOC)*

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<sup>3</sup> [2025] 10 BLLR 1048 (LAC)

*Limited v Commission for Conciliation Mediation and Arbitration and Others*<sup>4</sup>, namely that

*‘... a case must be truly exceptional to warrant a departure from the norm that a review is appropriate only once the dispute has been finally determined in a completed arbitration hearing.’*

(emphasis added)

Accordingly, Maluleka must establish a right to the relief he seeks, on the basis that his case is truly one of those exceptional ones warranting intervention, and that the arbitrator, in the exercise of his discretion, ought to have allowed him legal representation on the medical grounds he advanced.

[26] The LAC went on to describe the type of truly exceptional cases, which warrant intervention *in media res* by way of such a review:

*‘[27] Exceptional circumstances justifying judicial intervention in incomplete proceedings have been found to exist where such intervention was necessary to prevent illegality, to prevent grave injustice, or where justice could not otherwise be achieved.’*

*‘[28] Judicial intervention is all the more justified where a review is instituted in medias res to challenge and set aside a ruling premised on a material error of law.’*

[27] It is noteworthy that the characterisation of the type of interlocutory ruling or decision that might warrant intervention is when the effect of the ruling has a fundamental and decisive impact on the possible outcomes of a case, which can be corrected before the matter proceeds further.

[28] A ruling by an arbitrator on whether to allow legal representation, while important, concerns a procedural question which lies entirely within the arbitrator’s discretion. The type of discretion exercised in making such a ruling is what is known as a ‘true’ discretion. The arbitrator must weigh competing considerations and make a value judgment based on fairness. A range of permissible outcomes is possible, and the decision only stands to be reviewed if the arbitrator acted capriciously, based the decision on a wrong principle, was influenced by irrelevant considerations or failed to consider relevant factors. It is a decision that a court of review will not readily interfere with. A ruling on

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<sup>4</sup> (2020) 41 ILJ 493 (LC)

legal representation by its nature concerns the conduct of the proceedings and is not in the nature of a ruling which improperly prevents the substantive merits of the case being addressed or causes the arbitrator to determine a dispute which should not be before them.

[29] The arbitrator in this instance considered the question of whether it was reasonably necessary for Maluleka to have legal representation because of his mental condition. Ultimately, he was not persuaded that Maluleka had demonstrated a sufficient connection between his mental condition and his claimed inability to represent himself in the context of a misconduct dismissal case lacking complexity and no doubt also being cognisant of his legal expertise. After evaluating relevant considerations, he exercised his discretion by disallowing it.

[30] Despite the criticism of the arbitrator's finding that an alternative remedy was available in the form of an application for postponement until Maluleka was well enough to participate, his reasoning is not lacking in rationality. The arbitrator was plainly sceptical of how legal representation could really address the mental impairment Maluleka might be suffering from as a result of his depression and anxiety. However, he was sympathetic to the idea that a postponement to allow his mental condition to improve was a better way of dealing with incapacity. Moreover, as this court has observed in a similar situation, the arbitrator is duty bound to lend a party a helping hand where appropriate<sup>5</sup>.

[31] I am not persuaded that Maluleka has demonstrated his case is truly exceptional, let alone that the arbitrator ought to have exercised his discretion differently. circumstances which justify the court from departing from the prohibition against reviews during part-heard arbitration proceedings based on the medical grounds he advanced.

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<sup>5</sup> See e.g, *Marule v Nonceba NO and Others (Reasons)* (2025/112503) [2025] ZALCJHB 377 (28 August 2025) at paragraph [13].

Order

1. The application is heard as a matter of urgency in terms of Rule 39 of the Labour Court Rules, and any non-compliance with the said rules is condoned.
2. The application is dismissed.
3. No order is made as to costs.

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**R Lagrange**  
**Judge of the Labour Court**

Appearances:

For the Applicant: --- T Ngobeni of TM Ngobeni Attorneys

For the Respondent: --- N Motshegare

Instructed by: --- Lawtons Inc.