THE CONSTITUTIONAL RIGHT TO LEGAL REPRESENTATION DURING DISCIPLINARY HEARINGS AND PROCEEDINGS BEFORE THE CCMA

Jacques Johan Buchner

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Student number: 190011890
Supervisor: Professor van der Walt
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SUMMARY

The right to legal representation at labour proceedings of an administrative or quasi-judicial nature is not clear in our law, and has been the subject of contradictory debate in the South African courts since the 1920’s.

Despite the ambiguities and uncertainty in the South African common law, the statutory regulation of legal representation was not comprehensively captured in labour legislation resulting in even more debate, especially as to the right to be represented by a person of choice at these proceedings in terms of the relevant entrenched protections contained in the Bill of Rights.

The Labour Relations Act 12 of 2002 (prior to amendment) is silent on the right to representation at in-house disciplinary proceedings. Section 135(4) of Act 12 of 2002 allows for a party at conciliation proceedings to appear in person or to be represented by a director or co employee or a member or office bearer or official of that party’s registered trade union. Section 138(4) of the same Act allows for legal representation at arbitration proceedings, but subject to section 140(1) which excludes legal representation involving dismissals for reasons related to conduct or capacity, unless all parties and the commissioner consent, or if the commissioner allows it per guided discretion to achieve or promote reasonableness and fairness.

The abovementioned three sections were however repealed by the amendments of the Labour Relations Act 12 of 2002. Despite the repealing provision, Item 27 of Schedule 7 of the Amendment reads that the repealed provisions should remain in force pending promulgation of specific rules in terms of section 115(2A)(m) by the CCMA. These rules have not been promulgated to date.

The common law’s view on legal representation as a compulsory consideration in terms of section 39 of the Constitution 108 of 1996 and further a guidance to the
entitlement to legal representation where legislation is silent. The common law seems to be clear that there is no general right to legal representation at administrative and quasi judicial proceedings. If the contractual relationship is silent on representation it may be permitted if exceptional circumstances exist, vouching such inclusion. Such circumstances may include the complex nature of the issues in dispute and the seriousness of the imposable penalty (for example dismissal or criminal sanction). Some authority ruled that the principles of natural justice supercede a contractual condition to the contrary which may exist between employer and employee. The courts did however emphasize the importance and weight of the contractual relationship between the parties in governing the extent of representation at these proceedings.

Since 1994 the entrenched Bill of Rights added another dimension to the interpretation of rights as the supreme law of the country. On the topic of legal representation and within the ambit of the limitation clause, three constitutionally entrenched rights had to be considered. The first is the right to a fair trial, including the right to be represented by a practitioner of your choice. Authority reached consensus that this right, contained in section 35 of the Constitution Act 108 of 1996 is restricted to accused persons charged in a criminal trial. The second protection is the entitlement to administrative procedure which is justifiable and fair (This extent of this right is governed by the provisions of the Promotion of Access to Administrative Justice Act 3 of 2000) and thirdly the right to equality before the law and equal protection by the law.

In conclusion, the Constitution Act 108 of 1996 upholds the law of general application, if free and justifiable. Within this context, the Labour Relations Act 66 of 1995 allows for specific representation at selected fora, and the common law governs legal representation post 1994 within the framework of the Constitution.

The ultimate test in considering the entitlement to legal representation at administrative and quasi judicial proceedings will be in balancing the protection of
the principle that these tribunals are masters of their own procedure, and that they may unilaterally dictate the inclusion or exclusion of representation at these proceedings and the extent of same, as well as the view of over judicialation of process by the technical and delaying tactics of legal practitioners, against the wide protections of natural justice and entrenched constitutional protections.
1 INTRODUCTION

A right to legal representation is today, generally regarded as a necessity, and not as a privilege. This point was emphasized by the Hoexter Commission of Enquiry into the Structure and Functioning of the Courts. Within the South African Constitutional framework, the right to legal representation flows from two principles: that an accused person is entitled to a fair trial, and that of equality before the law, as well as the application of these principles to the judicial process.

As early as 1920, the Appellate Division of the High Court of South Africa in the case of Dabner v SA Railways and Harbours established the principle that there was no common law authority for the proposition that a party had a right to legal representation before tribunals other than courts of law.

Having regard to the sometimes severe consequences which a finding of guilty can have on the lives of the alleged perpetrator and his or her dependants, the following view of Lord Denning over the exercise of discretion in Enderby Town Football Club Ltd v The Football Association Ltd is still defensible and does it reflect those values which form part of a human rights culture:

Is a party who is charged before a domestic tribunal entitled as to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. They are masters of their own procedure, and if they, in the proper exercise of their discretion, decline to allow legal representation, the Courts will not interfere.

Is legal representation only a question of the proper exercise of discretion within the broader context of being “masters of their own procedure”?

1 RP 78/1983 volume 1 part II par 6.4.1.
2 1971(1) All ER 215.
Within the labour law context, the entitlement to, interpretation and extent of the right to representation is expressed in the Labour Relations Act 66 of 1995, and reconsidered in the Labour Relations Amendment Act 12 of 2002.

Fundamental rights, including *inter alia* the right to be legally represented, the right to equality and to equal protection by the law, as well as to the right to fair administrative action have, within the South African context, for the first time been specifically entrenched in the Interim Constitution, Act 200 of 1993, and thereafter in the final Constitution, Act 108 of 1996 (“The Constitution”). The statutory recognition and protection of these rights need therefore to be analysed and interpreted in terms of the Bill of Rights contained in the Constitution and of the common law, to establish it’s impact on the employer and the employee’s right to legal representation at internal disciplinary enquiries and at defined proceedings before the Commission for Conciliation Mediation and Arbitration (hereinafter referred to as the CCMA).

2 THE STATUTORY POSITION

2.1 LABOUR RELATIONS ACT 66 of 1995

The question of representation at in-house disciplinary proceedings and activities before the CCMA is a vexed an controversial one, involving disputes as to who is or who is not a labour consultant, a trade union official, an employer’s organization official, or a legal representative, and their respective right of appearance before the commission and/or proceedings. Certain of these categories of persons has been defined, including their legal statutory status regarding representation, and will be discussed in more detail in this chapter. Emphasis needs, however, to be focused on the application and enforcement of internal as well as quasi-judicial policy in reviewing the approach to representation at specific proceedings.
The issue of legal representation at labour adjudications, conciliations and arbitrations has similarly been a matter of some controversy, which has already been exhaustively debated. The following points have been extracted from the various arguments on the topic:

- The CCMA is not a court of law, but an administrative tribunal.
- A party to proceedings before an administrative tribunal would not under common law be entitled to legal representation as of right. Accordingly, the statutory granting of the right to legal representation before an administrative tribunal may be regarded as an alteration of the common law and therefore be restrictively interpreted.
- The CCMA is not an ordinary administrative tribunal as a commissioner acting as an arbitrator is empowered by section 142 of the Labour Relations Act 66 of 1995 to subpoena witnesses, including a witness *duces tecum*, administer an oath or accept an affirmation, and, after obtaining the necessary authorization from a judge of the labour court, can enter and search any premises for the purposes of seizing any book, document or object on those premises or taking a statement from any person on those premises who is willing to give such a statement.
- The granting of an unqualified right of appearance to legal practitioners would ostensibly favour the employer at the expense of the employee, certainly where the employer was not a “small employer” and the employee was not represented by a trade union.
- Unlike the industrial court, the commissioner acting as arbitrator is empowered, or at least has the discretion, to level the playing fields by adopting a more inquisitorial or interventionist role in order to ensure that all relevant facts are placed before the commission at the

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4 SA Technical Officials in Association v President of the Industrial Court and Others (1985) 6 ILJ 186 (A)

5 Dabner v SA Railways and Harbours 1920 AD 583.
arbitration. However, the levels of acceptability of such interventions are somewhat unclear.

The ministerial task team presented the following approach to legal representation in the explanatory memorandum to the Draft of the Labour Relations Act\(^6\):

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 task team’s justification for denying legal representation rests on the validity of the premise that “lawyers make the process legalistic, expensive and are responsible for delays”. The merits of these assertions are not fully canvassed in the explanatory memorandum, which is unfortunate given the importance of the prohibition. Although not expressly acknowledged, the task team appears to have derived some of its ideas in this regard from an article by Paul Benjamin, “Legal Representation in Labour Courts”\(^7\). Benjamin argues \textit{inter alia} that legal representation results in the process becoming legalistic, expensive and slow. He concludes by stating that participation by lawyers may lead to disputes becoming more formal, time consuming and expensive and quotes a comparative labour lawyer, Benjamin Aaron, as stating in regard to labour arbitration disputes in the United States of America that the involvement of lawyers “has tended to make the proceedings more formal, and has also increased both the expense or arbitration and the likelihood of delays”. Whether these conclusions are equally valid in South Africa is, however, nor really explored by Benjamin.

\(^6\) Act 66 of 1995.
\(^7\) (1994) 15 ILJ 250.
Benjamin’s principal criticism of legal representation appears to be that it has resulted in unequal access to representation, with employers gaining an unfair advantage over employees.

As a counter argument to the abovementioned criticism by Benjamin, Geoffrey Fick stated the following in *Natural Justice, Principles and Practical Application*\(^8\):

The advantages of having a representative trained in law are too frequently ignored and consequently deserve recollection. Council can, *inter alia*, act as a deterrent to the summary dismissal of a party’s case; bridge possibilities between the party and tribunal members; clear up vagaries and inconsistencies in testimony; and can focus attention of tribunal members on elements of a party’s claim. Moreover it is fair to observe that a lawyer has a rather unique ability to interpret relevant statutory provisions and to ensure consistency in administrative decision making by marshalling whatever prior decisions of the tribunal or the courts serve as a guide to the exercise of administrative discretions. 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 upon the administrative process should never be underestimated.

Section 185 of the Labour Relations Act 66 of 1995 (“LRA”) determines that every employee has the right not to be unfairly dismissed. The right is underpinned by section 23(1) of the Constitution, which proclaims that everyone has the right to fair labour practice, and therefore not to be unfairly dismissed. The section does not limit or define the parameters of the protection, but is seems sufficient to point out that the issue is whether the provision in question purports exhaustively to prescribe the employee’s protection against unfair dismissal in our law. If in the affirmative, it will be unconstitutional unless it can be rescued under the limitation clause entrenched in section 36 of the Constitution, which permits derogations from fundamental rights if they would be reasonable and justifiable in an free, open and democratic society, based on human dignity, equality and freedom and considering the nature of the right, the importance of

the object of the limitation, the extent of the limitation, and the relationship between the limitation and its purpose.

In the Code of Good Practice: Dismissal, Section C to the LRA\(^9\), a dismissal is labeled unfair if it is not effected for a fair reason and not in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in *legislation governing employment*.

In section 5 of the LRA, it is stipulated that no person may discriminate against an employee for exercising any right conferred by this Act.

Section 3 of the Code of Good Practice\(^{10}\) of the LRA explains the disciplinary measures short of dismissal, and elaborates in paragraph 4 of this section on the general prerequisites to dismissal as appropriate sanction. The Code refers to the seriousness and gravity of the misconduct, as well as some examples of same.

In section 4 of the Code\(^{11}\), the procedural aspects of a disciplinary hearing is outlined, and includes *inter alia* the employee’s right to be assisted by a trade union representative or a fellow employee.

Section 188A of the LRA further allows for an employer, with the consent of the employee, to request a council, an accredited agency or the Commission\(^{12}\) to conduct an arbitration into allegations about the conduct or capacity of that employee. In subsection 5 the right to representation is addressed in allowing the employee to be represented by:

- A co-employee;
- A director or employee; or

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\(^9\) Schedule 8 of section C of the LRA.

\(^{10}\) Note 9 supra.

\(^{11}\) Note 9 supra.

\(^{12}\) Commission for Conciliation Mediation and Arbitration.
A union representative

The representation of employees at the CCMA is further dealt with in sections 135(4), 138(4) and 140(1) of the LRA.

Section 135(4) allows for a party at conciliation proceedings to appear in person, or to be represented *only by* a director or employee of that party, or a member, office bearer or official of that party’s registered trade union or registered employer’s organization. The commissioner has no discretion to permit representation wider than the wording of this section for conciliation proceedings.

In terms of section 138(4) of the LRA a legal practitioners has a right of appearance before the CCMA for the purposes of arbitration. The party to the proceedings has, in addition, the opportunity to other representation as contemplated in section 135(4). It is evident from the abovementioned two sections, that the legislature did not intend to extent the right to legal representation to conciliation proceedings, where legal representation is barred.

Section 140(1) of the Labour Relations Act 12 of 2002 reads:

> Special provisions for arbitrations about dismissals for reasons related to conduct or capacity

(1) 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.

Before considering the substance of the section, it is important to clarify who the LRA recognizes as a legal practitioner.

A legal practitioner is defined in section 213 of the LRA as “any person admitted to practice as an advocate or an attorney in the Republic”. Automatically excluded are those persons who hold a law degree but are not admitted, as well as candidate attorneys who are only admitted after serving their two years of articles and successfully negotiating the admission exam.

The relevant provisions in section 140 may be analysed as follows:

140(1): “If the dispute being arbitrated is about the fairness of a dismissal……..”

As previously mentioned, legal practitioners do not have a right to appear at conciliation proceedings; and the provisions of this section refer only to arbitrations, where, in terms of section 138(4), legal practitioners do have a right of appearance. Section 138(4) can therefore be regarded as the default provisions, subsequently modified by section 140, where applicable.
The Statutory Position

For the provisions of section 140 to apply, the arbitration must be about or relate to the fairness or otherwise of a dismissal. “Dismissal” is defined by section 213 as meaning ‘dismissal as defined in section 186’, which is in turn restricted to terminations with or without notice\(^\text{13}\), refusal or failure to renew a fixed term contract either at all or on its original terms\(^\text{14}\), maternity dismissals\(^\text{15}\), selected re-employment and constructive dismissal. Any dismissals falling outside the restrictive categories imposed by section 186, are not effected by section 140, and representation at these disputes are accordingly governed by section 138(4).

Therefore, where parties are involved in a dispute that would normally be adjudicated by the labour court, but in terms of section 141(1) the parties have agreed to have the matter arbitrated by the CCMA, legal practitioners would be entitled to appear at the CCMA arbitration as of right. This view is supported by section 141(2), which holds that the arbitration proceedings contemplated by section 141(1) must be conducted in accordance with the provisions of sections 136, 137 and 138.

140(1): “the reason for dismissal relates to conduct or capacity…….”

Unfortunately, neither “conduct” nor “capacity” is defined by LRA. In the context of the section, one assumes that the section is referring to dismissals for misconduct and incapacity.

Accordingly, the limiting parameters of section 186 are further limited, as section 186(b), (d), and (e) and probably (c) do not involve either incapacity or misconduct, and therefore the provisions of section 140 only relate to dismissals where the employer has terminated a contract of employment with or without notice. It might seem somewhat curious that the extent of section 140 is limited to one category of dismissal, until one considers that the vast majority of dismissal

\(^{13}\) Section 186(a).
\(^{14}\) Section 186(b).
\(^{15}\) Section 186(d).
disputes are covered by section 186(a), which is in effect a catch-all provision, as clearly most dismissals involve the termination of the employment contract by the employer. It is the reason for the employer’s action that further categorises the dispute as being one of dismissal for misconduct or incapacity and therefore subject to the provisions of section 140.

140(1): “the commissioner and all the other parties consent…….”

Even in instances where both the parties are legally represented the commissioner has the right to ask to be convinced that legal representation is necessary. This is in contrast to the Labour Relations Act, 1956 where the industrial court was not empowered to exclude legal practitioners where both parties agreed on legal representation.

It would take a brave commissioner to ask the legal representatives of both parties to leave the arbitration but this could occur if the commissioner was of the justified view, for example, that the legal arguments of the representatives were obfuscating a relatively simple dispute, or where he sees an opportunity to settle the matter before the litigation commences and costs escalate. The abovementioned approach was endorsed in *Ndlovu v Mullins NO & Another*\(^{16}\) when considering section 140(1):

The subsection upon which the commissioner purports to rely requires the commissioner and each of the other parties to consent to legal representation on behalf of one or more parties to the arbitration proceedings. It is not sufficient for the parties to consent. Even if both parties consent by their conduct indicated unequivocally that they consented to legal representation on behalf of one or both of them it remains incumbent on the commissioner hearing the matter to independently exercise a discretion as to whether or not her consent should in the circumstances be given.

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\(^{16}\) (1996) 12 ILJ 654 (LC).
The court held in *Colyer v Essack NO & Other*\(^{17}\) that the consent, which entitles a party to be represented by a legal practitioner, is a discretion to be exercised by the commissioner who is duty bound to do so judicially. The section (140(1)(a)) does not give a commissioner the right to act on a mere whim when consenting to legal representation. Likewise, the court held, the withdrawal of the right to legal representation thus obtained cannot take place at the mere whim of the commissioner. The court held that section 140(1)(a) is clearly not intended to deal with the position where the commissioner exercises his or her discretion at the request of a party. It is meant to deal with the position where all parties before the arbitration want legal representation and the commissioner is then placed in a position to, nevertheless, to not to allow legal representation by withholding his or her consent. Such refusal should also be considered as a judicial discretion, which must be properly exercised, taking into account the factors listed in sections 140(1)(b)(i) to (vi). In this case it was established during the arbitration proceedings that the employee’s legal representative was in fact a candidate attorney, and not a legal representative as contemplated by the LRA. The commissioner subsequently excused the candidate attorney from the proceedings, and ruled that the proceedings continue without allowing the employee to approach and instruct another attorney to represent her. The court held that the commissioner acted grossly irregular in not considering the factors listed in sections 140 when refusing such representation.

If, after excluding the legal representation for the arbitration proceedings, the commissioner fails to settle the matter, or if it becomes clear that the dispute is not as simple as it appeared originally, the commissioner could always be at liberty to invite the legal practitioners back to the proceedings.

140(1)(b): “the nature of the questions of law raised by the dispute” and “the complexity of the dispute, the public interest, and the comparative ability of the

\(^{17}\) (1997) 18 ILJ 1381 (LC).
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*opposing parties or their representatives to deal with the arbitration of the dispute*

The conjunction ‘and’ between paragraphs (iii) and (iv) suggests that a commissioner must consider all the factors mentioned in the four paragraphs, so that an application under this subsection should transverse them all. The commissioner need not be satisfied on each; it is enough that he or she comes to the required conclusion upon a consideration of them in their totality. (*Malan v CCMA & Another* 18). In *Secunda Supermarket CC t/a Secunda Spar & Another v Dreyer NO & Other* 19 the court held that where a party applies for legal representation in terms of section 140(1)(b), he must persuade the commissioner that he cannot reasonably deal with the dispute without legal representation. The commissioner must thereafter determine the question by reference to the factors referred to in the subsection. The last mentioned view was supported in *Afrox Ltd v Laka & Others* 20.

In summary, it is therefore clear that section 138(4), read with section 140 of the LRA, explicitly states who may appear or be represented in arbitration proceedings. A commissioner has no discretion to permit any person other than those listed in that section to appear or act as a representative even if the other parties have no objection.

If a party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of one of the parties to the dispute does not fall within the ambit of section 138, the commissioner must determine the dispute on whether to allow or exclude legal representation.

18 1997 (9) BLLR 1173 (LC).
19 1998 (10) BLLR 1062 (LC).
20 1999 (20) ILJ 1732 (LC).
A dispute concerning the status of a representative in terms of section 138 is a factual dispute.\(^{21}\) The commissioner may call upon the representative whose status is being contested to demonstrate why he or she should be admitted as a representative in terms of section 138 of the LRA. The commissioner may request the production of documentation such as constitutions, payslips, the contract of employment, the prescribed from listing the directors of a company etc. Representatives should be prepared to tender evidence in support of their status.

The LRA is silent on the right to legal representation at disciplinary proceedings, and reference has to be made to the South African common law to address this situation.

### 2.2 THE LABOUR RELATIONS AMENDMENT ACT 12 OF 2002

It is imperative to consider the implication of the repeal of sections 135(4), 138(4) and 140(1) of the LRA, by the provisions of the Labour Relations Amendment Act, 12 of 2002.\(^{\text{\textcopyright LRA amendment Act}}\)

The new Item 27 to Schedule 7 of the LRA amendment Act, a transitional arrangement, specifically states that the repealed provisions of the LRA will remain in force until such time as rules made by the CCMA in terms of section 115(2A)(m) of the Act comes into force. Item 27 reads as follows:

(27) Representation in conciliation and arbitration:

(1) Until such time as rules made by Commission in terms of section 115(2A)(m) of the Act comes into force-

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\(^{21}\) Landman and Van Niekerk; *Practice in the Labour Courts 2001*. 
(a) section 135(4), 138(4) and 140(1) of the Act remain in force as if they had not been repealed, and any reference in this item to those sections is a reference to those sections prior to amendment by this Amendment Act;

(b) a bargaining council may be represented in arbitration proceedings in terms of section 33A of the Act by a person specified in section 138(4) of the Act or by a designated agent or an official of the council;

(c) the right of any party to be represented in proceedings in terms of section 191 of the Act must be determined by:

(i) section 138(4) read with section 140(1) of the Act for disputes about a dismissal; and

(ii) section 138(4) of the Act for disputes about an unfair labour practice.

(2) Despite sub-item 1 (a), section 138(4) of the Act does not apply to an arbitration conducted in terms of section 188A of the Act.

Rule 25 of the rules of the CCMA deals with objections in respect of a representative appearing before the Commission. The existence of this rule and the fact that it refers to objections against representatives appearing, clearly implies that there might be certain limitations to representation. The rules however, fail to set out or specify the nature and extent of such limitations. Furthermore, Rule 25(3) appears to refer to categories of representation other than legal representation. In a ruling on legal representation by CCMA Commissioner Minnaar Niehaus, in case EC 3134-02, he refers to a footnote to Rule 25, which appears to be no more than a verbatim repetition of the repealed section 135(4), 138(4) and 140(1) of the LRA amendment Act. The commissioner raised the question as to whether it should be assumed that what the rules ostensibly attempt to achieve, by way of this rather awkward reference to the repealed provisions of the Act in a footnote, is in fact to revitalize the repealed provisions of the Act.
He further averred that there should be no logical basis for such interpretation, and more specifically for the following reasons:

- Nowhere in the CCMA Rules is it stated that the repealed provisions of the LRA, remain in force. Reference is only made in the footnote in Rule 25 to sections 138(4) and 140(1) of the Act as they were prior to its repeal, as if these sections were still applicable, without any attempt to state that the intention is to incorporate these repealed provisions as substantive provisions in the CCMA rules. (The commissioner assumed that the only logical deduction to be made is that the footnote was only intended as a guidance or as a tool of reference and that the reference to the repealed provisions of the LRA was in fact made in error).
- By reincorporating the repealed provisions of the LRA, the CCMA most definitely did not give, as a creature of statute, effect to its mandate to regulate the issue of representation;
- Conceptually, the notion of a prohibition against legal representation cannot be reconciled with the content of Rule 25 which deals with objections against representation. The structure of the repealed sections 138(4) and 140(1) were such as to exclude legal representation unless certain criteria were met. Rule 25, on the other hand, clearly envisages that all types of representation be permitted unless certain circumstances are present. Incorporating the footnote as a substantive provision to Rule 25 is inherently inconsistent with the structure of the remainder of Rule 25; and
- Should it be assumed that the intention was to reincorporate the repealed provisions of the LRA, then one should at least expect consistence in approach throughout the Rules.

The commissioner concluded that *in lieu* to the abovementioned circumstances he had little hesitation to reach the conclusion that the CCMA rules do not
exclude legal representation and to the extent that they might have attempted to
do so, they clearly did not succeed.

Item 27 to Schedule 7 of the Act 12 of 2002 states that “Until such time as rules
made by the Commission in terms of section 115(2A)(m) of the Act come into
force” the old provisions shall remain in tact.

Section 115(2A)(m) refers to “all other matters incidental to performing the
functions of the Commission”.

Quite significantly, the draft contained in the original Bill on the Labour Relations
Amendment Act, referred to section 115(2A)(k) which refers to the right of any
person or category of persons to represent any party in any conciliation or
arbitration proceedings. It appears from the abovementioned that the legislature
opted for a generalized approach, to the effect that the transitional arrangement
shall prevail until the CCMA had issued rules on all matters incidental to its
functions. This may, according to Commissioner Niehaus include the issue in
respect of legal representation. He stated that the CCMA had failed, or elected
not to deal with the issue of legal representation in the recently published rules.
This does not, however, detract from the fact that the resolutive condition
contained in item 27 has been met.

He furthermore believed that the repealed provision barring or restricting legal
representation can no longer be regarded as having any effect and therefore
legal representation should be permitted without any limitation.

In his ruling commissioner Niehaus briefly discussed the implication of what he
termed another (unintended) factor. The last mentioned may be summarized as
follows:
The CCMA Rules have been published “in terms of section 115(6) of the Labour Relations Act, 1995” and “in terms of section 115(2A) of the Act”. It was published as such on 25 July 2002 as Regulation 961 in Government Gazette No 23611.

It therefore appears that the reference to section 115(6) and 115(2A) are intended to respectively refer to the amended section 115(6) and the new section 115(2A).

However, the new section 115(6) states that:

(a) A rule made under subsection (2)(CA) or (2A) must be published in the Government Gazette. The Commission will be responsible to ensure that the publication occurs.

(b) A rule so made will not have any legal force or effect unless it has been so published.

(c) A rule so made takes effect from the date of publication unless a later date is stipulated.

In terms of the abovementioned section 115(6)C, the CCMA rules took effect from the date of publication, which was 25 July 2002. However, the amendments to the Act only came into operation on 1 August 2002 as per the proclamation of the President of the Republic of South Africa contained in Regulation 61 of Government Gazette No 23611. The CCMA therefore issued rules in terms of the provisions of the Act, whilst those provisions were not operative as yet. Commissioner Niehaus was of the opinion that the effect of the above mentioned is that the rules issued by the CCMA on 25 July 2002 are in toto of no legal effect in that it was issued in terms of a non-existing statutory provision and therefore null and void.

He also stated that there was no compliance with the condition contained in Item 27 of Schedule 7 to the LRA amendment Act and as such the transitional
The Common Law Position

arrangement would remain in tact until the CCMA properly published Rules in accordance with the Act.

Despite the above mentioned the Commissioner concluded that he did not believe that a CCMA commissioner can competently declare the CCMA rules null and void, and that it rather fell within the powers and function of the labour court to do so.

In his ruling the commissioner held that:

- On the basis of assuming that the CCMA Rules published on 25 July 2002 in Government Gazette 23611 were competently published and as such were legally operative., it followed that the resolutive condition contained in Item 27 of Schedule 7 to the Labour Relations Act of 1995 (as amended) had been met, and that as a result the provisions of the repealed sections 135(4), 138(4) and 140(1) were no longer in force by virtue of the transitional arrangements.
- As a result the Applicant was entitled to be legally represented.

3. COMMON LAW POSITION

3.1 DEVELOPMENT OF THE COMMON LAW

As a general rule, the common law affords a party a fair opportunity to present his or her case (*audi alteram partem* principle). This raises the question whether the right to legal representation may be included within the framework of the *audi alteram partem* principle, and therefore inherent to the rules of natural justice.
Probably the leading case in our law on legal representation before an administrative tribunal is *Dabner v SA Railways and Harbours*[^22]. The point at issue was whether Dabner, an employee of the railway administration, against whom a charge of misconduct had been formulated, was entitled to be legally represented at an internal statutory enquiry that followed. The appeal court, per Innes JA with the full bench concurring, held that a person before such an enquiry was not entitled to legal representation. A large portion of the *ratio* of its decision is to be found in the following passage:

> Now clearly the statutory board with which we are concerned is not a judicial tribunal. Authorities and arguments, therefore, with regard to legal representation before courts of law are beside the mark, and there is no need to discuss them. For this is not a court of law, nor is this enquiry a judicial enquiry. True, the board must hear witnesses and record their evidence, but it cannot compel them to attend, nor can it force them to be sworn; and, most important of all, it has no power to make any order. It reports its finding, with the evidence, to an outside official, and he considers both and gives his decision. Nor can it properly be said that there are two parties to the proceedings. The charge is formulated by an officer who is no party to the enquiry. The board is a domestic tribunal constituted by statute to investigate a matter affecting the relations of employer and employee. And the fact that the enquiry may be concerned with misconduct so serious as to involve criminal consequences cannot change its real character.

On almost every issue raised by Innes CJ as a justification for not permitting legal representation as of right, the situation differs from that pertaining in the case of an arbitration conducted by the CCMA. Hence under such an arbitration:

- There are two parties to the proceedings;
- The parties and/or other persons may be compelled as witnesses to attend the arbitration;
- The witnesses may be forced to be sworn; and
- The commission has the power to make an order, which shall be final and binding.

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[^22]: 1920 AD 583.
It is also easy to conceive of the situation in an arbitration (concerned, for example, with a simple dismissal of theft) where a party, having been compelled by a commissioner to adduce evidence under oath, proceeds to incriminate himself, thereby adducing evidence which may be utilized against him at a subsequent criminal trial.

In Morali v President of the Industrial Court\textsuperscript{23}, the question was discussed as to whether the discretion to allow or to refuse legal representation has been taken away by the provisions of section 45(9)(c) of the Labour Relations Act, 1956\textsuperscript{24}. An analyses of the clear, lucid and plain language of the subsection shows that the discretion vested in the industrial court to permit or refuse legal representation to a party in dispute before it, has indeed in specific circumstances been taken away and that such party is entitled as of right to representation, that is if no party objects thereto. And the subsection goes no further than that. It does not strip the industrial court of the discretion to permit a party to be represented even if the opposing party objects; it only deprives him of his right to demand representation. The court further held that (i) this view does not detract from the meaning to be extracted from the language of the subsection, (ii) is consistent with the common law, (iii) goes no further than is necessary in limiting or prescribing an existing power, that is, to exercise discretion.

Baxler, in Administrative Law (1991) 555, noted that the right to legal representation is not an essential feature of the \textit{audi alteram partem}- principle, but points out that the flexibility of the rules of natural justice accommodates legal representation, but only under certain circumstances.

These circumstances include:

\textsuperscript{23} 1986(7)ILJ 690 C.
\textsuperscript{24} Act 28 of 1956.
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- disputes of a complex nature,
- the demands of public policy within the context of natural justice and equity,
- cases involving a conferred right to legal representation in contract,
- the express or implicit incorporation of the rules of natural justice, as well as
- the intention of the parties as contemplated from the wording of the contract.

In Morali v President of the Industrial Court\textsuperscript{25}, the court held that the mere fact that a rule is contrary to natural justice does not necessarily make it contrary to good morals and therefore void.

In Ibhayi City Council v Yantolo\textsuperscript{26}, Zietsman AJP opined that there was:

No rule of natural justice, or rule of practice in labour matters, that determines that the word “representation”, where it is not qualified, must be interpreted to mean lay representation only. There is certainly, in my opinion, no reason to so restrict the meaning of the word as it is used in the staff regulations.

The court, however, pointed out that where regulations provide that only lay representation, and not legal representation, will be allowed, then such regulations will be valid. Zietsman AJP summarized the authority on the right to legal representation into two categories, namely:

- Where no specific right to representation before a tribunal is given in the statute or regulation governing the proceedings of that tribunal, no representation need be allowed; and
- Where the relevant statute or regulation do allow representation, such representation can be limited by the terms of the statute or regulation to

\textsuperscript{25} Note 23 supra.
\textsuperscript{26} 1991(12) ILJ 1005 (E).
exclude, for example, representation by an attorney, or the statute can state specifically that representation by an attorney will be allowed.

Zietsman continues in stating that there is no rule of natural justice that requires that representation be followed. An exception to this rule may apply where it appears that because of the complexity of the issues to be determined, a person who can be adversely affected by the findings of the tribunal cannot be said to have been given a fair hearing or a fair opportunity to present his case if he has been deemed some form of representation. This case is certainly not authority for the proposition that legal representation may be permitted at all proceedings including those with which we are concerned here.

In *Lace v Diack and Others*\(^{27}\), the court held that there is certainly no absolute right to legal representation in our law, but where an employee faces the threat of a serious sanction, such as dismissal, it may, in the circumstances, be advisable that he be permitted the representative of his choice. The disciplinary procedure usually provides for representation by an employee or shop steward.

The court held 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. In this case the employee faced charges of attempted fraud, the using of abusive language to a paymistress and acting aggressively towards a security guard. The court held that it had not been persuaded that the appeal hearing involving such complex and difficult issues that legal representation should have been permitted for a fair hearing to take place. Consequently this ground of review against the outcome of the disciplinary hearing failed.

Insofar as these judgments have focused on the nature of the enquiry as being a decisive factor, it would appear that they are reconcilable. However, it is

\(^{27}\) 1992 (13) ILJ 860 (W).
interesting to note that the view of the court in the *McNellie v Lamprecht and Nissan SA (Pty) Ltd* judgment\(^\text{28}\), i.e. that an enquiry relating to charges involving fraud, involved such complex issues that legal representation became necessary for a fair hearing, was not followed in *Lace v Diack and Others*\(^\text{29}\), which involved similar charges.

In the arbitration award of CCMA commissioner Hambidge, *in SACCAWU v Citi Kem*\(^\text{30}\), she addressed, in general, the employee’s right to be represented at internal disciplinary enquiries. She identified the right of employees to be represented in one way or another at such proceedings as one of the requirements of a fair hearing. This right, according to her, does not necessarily imply actual or physical representation, but at least to be made aware and afforded an opportunity to be represented. She continues by stating that in instances where employees request representation and the representative is not available, it is advisable to postpone the hearing until a representative is available. She concludes her findings on representation by stating that the mere fact that the charges relates to serious offences would have convinced her to insist on employees being represented by either a co-employee or a trade union representative. Hambidge, unfortunately did not address or discuss the entitlement of representation by a legal representative, as it was not necessary on the merits of the case.

In *Yates v University of Bophuthatswana and Others*\(^\text{31}\) the court held the view that apart from a recognition of the right to legal representation, what is generally accepted as an essential aspect of cases before tribunals is the principle of a fair hearing. The celebrated principles of natural justice, according to the court, provide that persons who are likely to be affected by administrative action should be entitled and afforded a fair and impartial hearing before a decision to act is

\(^{28}\) 1994 (3) SA 665 (A).

\(^{29}\) Note 27 supra.

\(^{30}\) (1998) 2 BALR 160 (CCMA).

\(^{31}\) 1994 (3) SA 815.
taken. Further, that those principles are germane to almost all systems founded on the principles of the common law. (The basic requirements of a fair and impartial hearing are now enjoying almost universal recognition, and have become reliable aphorisms in the South African legal lexicon)\textsuperscript{32}.

In \textit{Yates}, Friedman J held that it is to be welcomed that the principles of natural justice escalate with increasing strength. He remarked that these principles constitute the forthright values of “those fundamental principles of fairness which underlie and ought to underlie every civilized system of law”. Basically people have an instinctive reaction to what is fair and unfair.

Baxter, \textit{Administrative law} at 540, had the following views on the principles of natural justice:

\begin{quote}
The principles of natural justice are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration the enforcement serves as a lesson for future administrative action. But more than that, and whatever the merits of any particular case, it is a denial of justice in itself for natural justice to be ignores. The policy of the courts was crisply stated by Lord Wright in 1943:

“If the principles of natural justice are violated, in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decisions must be declared to be no decision.”
\end{quote}

The courts have therefore nearly always taken care to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter.

Friedman J agrees with the above mentioned interpretation by Baxter and continues by focusing on the importance of procedural justice. According to the

\textsuperscript{32} 835 F-G.
judge it is imperative that a distinction be drawn between the merits of a decision and the process of reaching it. Even if the merits are unassailable, they cannot justify and infraction of the rules of procedure in which the principle of natural justice have been ignored or subverted.

The judge concludes that justice presupposes that a party be afforded a fair and proper opportunity to present his or her case. The basic test of fairness also involves the absence of bias. Both parties must be given an equal opportunity to present their cases, and consequently “administrative action must not be vitiated, tainted or actuated” by bias.

The rule against bias has also been stated by Lord Denning MR in Metropolitan Properties (FCG) Co Ltd v Lannon\(^23\) in which he stated the logical philosophical theory underlying it in the following words:

Suffice it that reasonable people might think that he (was biased). The reason is plain enough. Justice must be rooted in confidence: and justice is destroyed when right minded people go away thinking: “the Judge was biased”.

In Lunt v University of Cape Town and Another\(^34\), Howie J held that the operation of contractual principles does not exclude the right to a hearing. In this view the sphere on contract is a major vehicle for the application of the rules of natural justice. According to him the reason for reading natural justice into contracts is to constrain the exercise of powers that arise from contracts in exactly the same way as it is read into statutes to constrain the exercise of certain statutory powers.

In McNellie v Lamprecht and Nissan SA (Pty) Ltd\(^35\), the Transvaal Provincial Division had to decide whether the right to be represented by a person of his

\(^{23}\) (1969) 1 QB 577 (CA).
\(^{34}\) 1989 (2) SA 438C.
\(^{35}\) Unreported Case 396/92.
choice from his working area, which was conferred on the Applicant in terms of the disciplinary guidelines of his employment contract, included the right to be legally represented.

In the case, the charges facing the Applicant at the disciplinary hearing were:

- Fraudulent action as a result of changing expensive radios with cheaper radios;
- Possession of company property without authorization;
- Non compliance with company procedures; and
- Misuse of position of trust.

The court held that the Applicant was entitled to legal representation and in so doing, took into account the following factors:

- The serious charges facing the Applicant, who ran a considerable risk of being dismissed (surely by virtue of facing a formal disciplinary hearing, anyone runs the risk of dismissal), and
- The nature of the enquiry, and more specifically the presentation of evidence and documents on behalf of the complainant, the fact that the Applicant had a right to cross-examine the complainant’s witnesses, and that evidence had then to be presented on behalf of the Applicant and arguments addressed.

The court concluded that the nature of the enquiry suggested a type of quasi-judicial proceeding which was far more than a mere informal enquiry as to casual breach of contract of employment. The serious nature of the charges, namely fraud, could not adequately be handled by a fellow workman, and in the court’s view legal representation should have been allowed. The court held that however informal the enquiry may have been, the rules of natural justice were violated and the Applicant was prejudiced thereby to the extent that a review should be allowed.
Quite apart from the specific words of the applicable rules, the context can also nuance the meaning ascribed to the word “representative”. In *Lamprecht and Another v McNellie*\(^36\), the court accepted as correct the view that the word representative, read within the context of Nissan’s guidelines for “Grievance and Disciplinary Handling”, did not refer to a legal representative. Where no general right to representation whatsoever is conferred by contract, a court will consider whether any such right is conferred in terms of any disciplinary code and, if so, then such code binds the parties *contractually*. The court accepted that the presence in the contract of this express provision for a particular form of representation or of any general right to representation, gives rise to the inference that no other right to representation was intended to be conferred upon the employee at such an enquiry.

The employer’s guidelines for grievance and discipline handling had therefore provided for the right of the employee to choose his own representative. The employee alleged that the guidelines formed part of the terms and conditions of his employment and such guidelines had effectively guaranteed entitlement to legal representation.

The court held that the guidelines did not envisage a contractual intent, in spite of the use of the word “right”. The “right” referred to the rights necessitated by the unfair labour practice concept contained in the LRA, namely the right to a fair hearing and not a contractual right. The court held further that there had never been an offer by the employer to the effect that legal representation would be allowed. The court noted that, in fact, the letter which had initiated the proceedings, informed the employee that he had the right to be represented by any person from his working area and consequently the contractual argument entitling him to legal representation failed.

\(^{36}\) 1992 (3) SA 665 (A).
The court did not agree that the publication and implementation of the guidelines by the employer had created a legitimate expectation on the part of the employee. In considering whether the employee had a legitimate expectation to be entitled to legal representation, the court said that, objectively speaking, no such expectation arose. One reason was that the employer had never before permitted legal representation in disciplinary proceedings and secondly that a proper construction of the word “representative” led to a conclusion that a legal representative had hardly been contemplated. This flowed from the fact that the other people involved in the proceedings were all lay people.

In *Dladla v Administrator, Natal*[^37], the applicants were summoned to attend a hearing and were informed that they might each be assisted by an employee of the Provincial Administration (their employer). The attorney for the applicants was informed that he would neither be permitted to represent the applicants, nor be granted access to the venue of the hearing. The reason for the refusal to permit legal representation, a single and terse one, has been furnished in the affidavits submitted by the respondents (employer). It had nothing to do with the nature, scope or circumstances of the particular enquiries, which did not enter the reckoning. The employer simply relied, as one of the affidavits put it, on ‘a convention generally recognised’ that legal representation, rather than representation by another employee, was ‘not allowed in in-house disciplinary hearings of this nature’. The hearing continued in the absence of the legal representative, the applicants who relied on representation, were not allowed postponement of the proceedings to allow them to prepare their case, they were found guilty of misconduct and dismissed from their employment.

The court referred to the judgment in *Administrator, Transvaal, and Others v Zezile and Others*[^38], where it was held that the entitlement to legal representation at disciplinary proceedings had to be reviewed and conducted in conformity with

[^37]: 1995(3) SA 769 (N).
[^38]: 1991(1) SA 21 (A).
the principles of natural justice and the *audi alteram partem* rule. The court refrained from expressing on the abovementioned because it was unnecessary considering the merits of the case.

In *Administrator, Transvaal, and Others v Zezile and Others*\(^ {39} \) the court contended that neither the Public Service Act\(^ {40} \), not the Public Service Staff Code had forbidden legal representation on such occasions or established any scheme incompatible with it. Nothing had consequently precluded the official in charge of the disciplinary proceedings from permitting it. To allow legal representation, the court held, that it had discretion in allowing legal representation whenever it appeared in the circumstances appropriate to do so. They did not exercise their discretion, however, freely and fairly, according to the court. Instead they fettered it, treating the convention that they had invoked as a hard and fast rule and closing their minds as a result to the question whether, in the particular circumstances of the case, a deviation from the usual practice was an idea to be entertained.

In *Dladla v Administrator Natal*\(^ {41} \), Didcott J, referred to *Pett v Greyhound Racing Association Ltd*\(^ {42} \), an English case about a licensed trainer of greyhounds who had been denied legal representation at a disciplinary enquiry into his conduct. Lord Denning MR had this to say\(^ {43} \):

> Mr Pett is here facing a serious charge........If he is found guilty, he may be suspended or his license may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry I think that he is entitled not only to appear by himself but also appoint an agent to act for him......... Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may

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\(^ {39} \) Note 38 supra.

\(^ {40} \) Act 71 of 1956.

\(^ {41} \) Note 37 supra.

\(^ {42} \) (1968) 2 All ER 545.

\(^ {43} \) (132 A -133A) (QB) 549 C-I (All ER).
be tongue-tied or nervous, confused or wanting his intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘You can ask any questions you like’; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man’s reputation or livelihood is at stake, he not only has to speak by his own mouth. He has the right to speak by council or solicitor…….Natural justice then requires that he can be defended, if he wishes, by council or solicitor.

The above mentioned remarks of Lord Denning have not been accepted in England, according to Lamprecht and Another v McNellie\textsuperscript{44}, as authority for the proposition that legal representation must always be countenanced in situations of the sort with which he dealt. According to Didcott J, the Lamprecht and Another v McNellie judgment left open the question whether our law took the same general view of the discretion allowed in the state of affairs thus postulated. That it surely does so, is an answer for which support can be derived, however from Morali v President of the Industrial Court and Others\textsuperscript{45}. In this matter Berman J declared at 133 C-D

The common law……..provides, and it is indeed one of the cornerstones of the common law, that a party be afforded a fair opportunity to present his case, which is a facet of the audi alteram partem rule, so that whilst the party appearing before an administrative tribunal has no right to be represented, the tribunal has a discretion to permit this, ……..a discretion which it will exercise in appropriate cases, ……each case being dealt with on its particular merits.

Didcott J holds that it seems that both Berman J and Lord Denning MR were correct in their treatment of the topic, and to conclude that no absolute right won recognition.

During the course of the argument in court the applicants contended that where legal representation is neither allowed, nor prohibited by the applicable

\textsuperscript{44} Note 36 supra.
\textsuperscript{45} Note 23 supra.
legislation, that the permissibility or otherwise of such legal representation lay within the discretion of the tribunal whenever it appeared appropriate: the respondent, it was averred, fettered its discretion, treated the convention that no legal representation was permitted as an inflexible rule and closed its mind as to whether legal representation ought to have been allowed in the circumstances. Under the circumstances where no absolute right to legal representation was recognized, Didcott J quoted with approval the views of Lord Denning MR over the exercise of discretion in *Enderby Town Council Football Club v The Football Association Ltd*:

> It is a matter for the discretion of the tribunal......But I would emphasize that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A Domestic tribunal is not at liberty to lay down an absolute rule: “We will never allow one to have a lawyer to appear for him”. The tribunal must be ready in a proper case, to allow it. That applies to anyone in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart.

In *casu*, Didcott J concluded that the failure to have allowed the applicants legal representation amounted to a failure to have exercised a proper discretion and set aside the dismissals of the applicants.

In *Cuppan v Cape Display Chain Services*, the right to legal representation depended upon whether a clause in a disciplinary code, which provided for “representation by a constituency shop steward at any disciplinary hearing”, constituted a binding contractual term between the parties. The disciplinary code also provided that disciplinary enquiries would be held “in accordance with natural justice and in terms of this agreement”. In concluding that the code formed part of the contract between the parties, Page J noted that a particular form of representation was intended to be conferred upon the applicant. The

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46 Note 2 supra.
47 1995(4) SA 175 (D).
learned judge further focused on whether these provisions confer on the applicant the right to be legally represented at disciplinary hearings. He held that:

as emerges from the evidence cited earlier in this judgment, the contemplated enquiry in the present case is a relatively simple one and would not fall within this exception (that is that the flexibility of natural justice would appear to accommodate legal representation in unusually complex cases involving complicated evidence or legal issues).

It therefore follows that the mere inclusion in the disciplinary procedure of a recognition of the principles of natural justice does not give rise to a right on the part of the applicant to be legally represented at the enquiry, and that the right would have to be specifically conferred upon him by the terms of the contract.

Wiechers, *Administrative Law* (1985) 211, poses the question that if the subject matter of an administrative procedure is of a highly technical nature and involves complicated legal aspects, can it be said that if legal representation is refused at for instance a disciplinary hearing, that an opportunity to state his case has been given to the subject? Baxter, *Administrative Law* (1984) 251, too interprets the legal position as that there is no right to legal representation before a tribunal under the principles of natural justice. Similarly to Wiechers, he indicated that in unusually complex cases involving complicated legal issues, legal representation might be regarded as a *sine qua non* of a fair hearing.

In *Turner v Jockey Club of South Africa*48 the applicant, who had been employed by the respondent and its predecessor as a distribution supervisor for some fifteen years, had been given written notice to attend a disciplinary hearing concerning a charge against him of alleged complicity in the unauthorized removal of company property. The notice reminded him that he had the right to be represented at the hearing and that he could nominate a work colleague as his representative. The applicant attended the hearing accompanied by his attorney, but was informed that he would not be entitled to legal representation,

48 1974 (3) SA 633 (A).
whereupon he applied to a local division of the court for an order granting him leave to be legally represented by a legal practitioner of his choice at the disciplinary hearing and that the hearing be stayed pending the granting of the order. The letter of appointment under which the applicant was employed, headed “New contract of employment”, recited the terms of his employment and in paragraph 10 stated that the applicant would be subject to and bound by the provisions of the company’s rules and regulations, which included the company’s disciplinary and grievance procedure. The respondent’s disciplinary code provided in the preamble thereto that its schedule of offences and likely disciplinary actions were to be used as guidelines only, and reserved to the company the right to amend the guidelines. Clause 2.6 of the section headed “Disciplinary Procedure” provided that the constituency shop steward, or alternatively shop steward, then at work nominated by the employee concerned was to be present at any disciplinary enquiry and might represent him or her. Clause 3.2 of the section dealing with dismissal provided that “the enquiry shall be held in accordance with natural justice and in terms of this agreement”.

It was contended by the applicant before the local division that the contract between the parties incorporated the disciplinary code and procedure, which in turn stipulated that enquiries were to be held in accordance with natural justice, and in terms of the agreement and that this provision, properly construed, conferred on the applicant the right to legal representation at such an enquiry.

It is evident from the above that there is an inconsistency in the South African common law with regard to the courts’ interpretation of the inclusion of the right to legal representation within the ambit of natural justice. There appears to be a general consensus that the application of fairness and natural justice may entail the recognition of legal representation at quasi-judicial and disciplinary proceedings, on condition that extraordinary circumstances, including the complexity of the merits and the seriousness of the sanction, exists. The courts
further recognizes the specific terms and conditions of the contract existing between the employer and employee.

3.2 ARGUMENTS AGAINST THE RIGHT TO LEGAL REPRESENTATION

In light of the above discussion, we can identify the following arguments against admitting legal representation at administrative and quasi judicial proceedings:

- Tribunals are regarded as being masters of their own procedure and the courts will not lightly interfere in the proper exercising of the discretion of such tribunals.
- Proceedings before a tribunal ought not to be equated with proceedings before a court of law.
- The practice and policy has developed that no legal representation is allowed in some enquiries as they are conducted informally, and by lay persons having no special knowledge of the law.
- Legal representation should not be considered in cases not involving complex legal and factual issues.
- Legal representation should not be allowed in cases where the employee does not run the risk of a serious infringement of his or her rights.
- Representation (other than legal), often adds a more valuable contribution to first hand knowledge and relevant circumstantial considerations, ensuring equal, or even sometimes greater competence to a representative to defend the affected person.
- In situations where there are relevant guidelines one could discern the overall intention that the enquiry was to become a domestic matter.
- Situations where there were applicable regulations allowing an employer to restrict the choice of the representative, an employee is entitled to request assistance at an enquiry, and
In situations where binding contractual terms were applicable, the party seeking legal representation had to show an intention that the rules of natural justice were to be incorporated into the contract and that the contract conferred the right.

3.3 ARGUMENTS IN FAVOUR OF ALLOWING LEGAL REPRESENTATION

The previous discussions also raised the following arguments in favour of legal representation:

- Professional legal representation is best equipped to present someone on purely legal issues.
- The dire consequences to the affected person, if found guilty, should allow for the right to representation of the affected person’s choice.
- The lack of skill in such proceedings on the part of representatives other than legal representatives.
- The need for legal representation for a proper presentation of a defense endorsed by the inadequate defenses proffered in most cases by lay persons fending for themselves.
- The difference between protagonists: an ignorant, illiterate and inarticulate affected person against a well-trained, experienced and competent in-house specialist, or in a situation where the applicant is a foreigner with no knowledge of local legal proceedings.

It is submitted that any attempt to ascertain whether one category of the above argument outweighs the other would not merely be subjective, speculative and arbitrary with no regard to the nature of the dispute or the relationship between the parties, but would also negate justice between the disputants. The challenge lies in an inclusive and accommodatory approach which at once ensures that the
procedures adopted by and before tribunals are not “over judicialised” and which also leaves the affected person with the belief that he or she has been given a fair opportunity to present the other side of the story. A possible formula will be one which will therefore preserve the independence and the integrity of tribunals (in terms of simplicity, speed, cost, informality, accessibility, expertise and flexibility); but which is simultaneously flexible enough to translate “fair opportunity to reply” within the context of the *audi alteram partem* principle into the most effective and adequate answer to allegations against the affected party.

From an affected person’s perspective, this entitlement addresses to some extent the factors such as faith in the quality of the defense being proffered, as well as in the person making the representation on his or her behalf. It establishes a sustained belief that justice is being done and is being seen to be done and that irrespective of the outcome of the proceedings, faith in the procedure that she or he has been given a fair opportunity to present the other competently, adequately and effectively. From the view of the tribunal, it has both an equal entitlement to claim legal representation and to object to such representation under circumstances where it does not deem it appropriate.

It may therefore be summarized that although the common law does not entitle a party before an administrative tribunal to legal representation as of right, it does provide that such a party be afforded a fair opportunity of presenting his or her case - an application of the *audi alteram partem* rule.

### 4. EFFECT OF THE CONSTITUTION ACT 108 OF 1996

#### 4.1 RIGHT TO A FAIR TRIAL

The Constitution is the supreme law of the country and any law or section of law inconsistent with the Constitution will be voidable to the extent of such
Section 39(1)(b) of the Constitution provides for the compulsory recognition of the common law when interpreting the Bill of Rights.

It is now settled law that, where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation—unless there is a contractual stipulation to the contrary (Lamrecht and Another v McNeillie). However, in terms of section 25 of the Interim Constitution Act 200 of 1993 (“Interim Constitution”) and section 35 of the Constitution, every detained person has the constitutional right to have access to, and to be represented by a legal practitioner. In at least two judgments of different divisions of the supreme court the question arose as to whether this implies a constitutional right to legal representation in the course of disciplinary proceedings. (Cuppan v Cape Display Chain Services and Myburgh v Voorsitter van die Scoemanpark Ontspanningklub Dissiplinere Verhoor en n Ander).

In both cases the respective courts arrived at a similar conclusion. The said provision in the Bill of Rights essentially relates to persons who are accused of offences in courts of law. There was no indication in section 25 of the Interim Constitution or section 35 of the Constitution that the right to legal representation ought to extend to all internal disciplinary proceedings and it was unnecessary to adapt the common law in this regard. There was, therefore, no general right to legal representation inferred by the above mentioned sections of the South African Constitution.

In Cuppan v Cape Display Supply Chain Services the applicant submitted as an alternative to the common law position regarding the right to legal representation,
that he was entitled to be represented by a legal representation of his choice at a disciplinary
enquiry under the auspices of section 25(3)(e) of the Interim Constitution. The court did not spend much
time on the submission, holding that section 25(3) was clearly concerned only with persons who were accused of
offences in a court of law. Cachalia et al in his work, *Fundamental Rights in the New Constitution*54,
explained that section 25 essentially has to do with procedural human rights which accrue to detained persons,
convicted persons, arrested persons and accused persons. The court further investigated whether
the contractual incorporation of the disciplinary code into the employee’s contract of employment implied a right to legal representation. This was found not to be the case, since the provision was merely made for a shop steward to be present at a hearing and to represent the employee concerned.

In *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others*55 the court had to consider whether a person had a right to legal representation in terms of section 35(3) of the Constitution. In this case, the applicant, a third year student in journalism, and employed at the Peninsula Technicon, attended an internal disciplinary hearing accompanied by his attorney. When advised that his attorney would not be allowed to represent him at the hearing, the applicant withdrew, together with his attorney, and took no further part in the proceedings. The hearing was thereafter conducted in his absence, and after being found guilty of gross misconduct, the applicant was dismissed. The disciplinary code of the Technikon further allowed for a process of appeal. The rules afforded the applicant the right to appeal to the council disciplinary committee (“CDC”). He exercised his right by lodging a notice of appeal together with detailed written submissions in support thereof. The CDC met on 28 January 1999 and upheld the finding of the internal disciplinary committee (“IDC”). The applicant then lodged a further appeal to the Technikon’s council. The council considered the appeal on 17 March 1999 and formed the

54 (1994) 36 Juta.
55 2000 (4) SA 621 C.
view that the CDC had not properly applied its mind to the matter. Consequently it upheld the appeal and remitted the matter to the CDC for reconsideration.

Accordingly, a further meeting of the CDC was convened on 14 April 1999. The applicant attended the meeting. As on all previous occasions, he was accompanied by his attorney. Although rule 10.2.15 of the disciplinary code of the Technikon, which prescribes the procedures for an appeal to the CDC, is silent on the issue of legal representation, the CDC decided that the applicant could only be represented at the hearing of the appeal by a student or staff member of the Technikon and not by his attorney. When the applicant was advised of this decision, he and his attorney once again withdrew. The CDC again upheld the finding of the IDC that the applicant should be expelled and the applicant once again lodged a further appeal to the Technikon council.

The council met and considered this appeal on 17 June 1999. On this occasion it upheld the finding that the applicant should be expelled. The applicant subsequently referred the matter to the High Court for review. At the hearings of the IDC and the CDC the applicant contended that he was entitled, as a matter of right, to be represented by his attorney. The attitude of the IDC was that, according to the provisions of rule 10.2.11(1)(viii), the applicant was not entitled to be represented by someone who was not a student or staff member of the Technikan. The CDC decided that, although the rules of the Technikon do not specifically provide for legal representation before it, it was prepared to allow the applicant representation by a student or a staff member of the Technikon, but not by anyone else.

On the papers before the court the applicant persisted in his contention that he was entitled to be represented by his own attorney before the IDC and the CDC. Based on this premise he sought relief which was twofold: Firstly, an order declaring that on a proper interpretation of the Technikon’s rules, including rule 10.2.11(1)(viii), students are permitted to be represented by “outside
representatives” in matters such as the present before the IDC and the CDC. Alternatively, that rule 10.2.11(1)(viii) is unconstitutional. Secondly, an order that the decisions of the IDC and the CDC be set aside for failing to allow the applicant the legal representation by his attorney.

In argument, Mr. Farlam for the applicant, did not contend that the right to be represented by a lawyer of one’s choice can be considered as a *sine qua non* for a procedurally fair administrative hearing in all circumstances. Whether legal representation is an essential requirement of a fair hearing, Farlam submitted, will depend on the circumstances of each case. In the present case, he contended, the refusal to allow the applicant to be represented by his attorney, who was present and had prepared submissions, rendered the proceedings before the IDC and the CDC unfair.

In support of these contentions, Farlam submitted that in the case of disciplinary hearings by administrative tribunals, guidance should be obtained from the rights permitted to accused persons under section 35(3) of the Constitution. Thus, for example, his argument proceeded a person facing a disciplinary enquiry should have the right to:

- be informed of the charge with sufficient detail to answer it[^56];
- have adequate time and facilities to prepare a defense[^57];
- be present when being tried[^58], and
- choose and be represented by a legal practitioner and to be informed promptly of this right.[^59]

[^56]: section 35(3)(a) of the Constitution.
[^57]: section 35(3)(b) of the Constitution.
[^58]: section 35(3)(e) of the Constitution.
[^59]: section 35(3)(f) of the Constitution.
Farlam also found support for his contentions in the judgment of Friedman JP in *Yates v Bophuthatswana and Others*\(^ {60}\), as well as in the following statements by Lord Denning MR in *Pett v Greyhound Racing Association Ltd*\(^ {61}\):

> Now the point arises: has the trainer a right to be legally represented? The club objects to any legal representation.

Council for the defendants says that the procedure is in the hands of the stewards. If they choose to say: “We will not hear lawyers”, that is for them, he says, and it is not for the courts to interfere. I cannot accept this contention. The plaintiff is here facing a serious charge. He is charged with either giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his license may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry, I think that he is entitled not only to appear by himself but also to appoint an agent to act for him.

Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer......I should have thought, therefore, that when a man’s reputation or livelihood is at stake, he not only has a right to speak his own mouth. He has also a right to speak by council or solicitor.

As to Farlam’s argument, based on invoking the provisions of section 35(3) of the Constitution, Oosthuizen for the Technikon’s counter argument was that these constitutional provisions do not apply to administrative hearings.

The court held that the right as contemplated by section 35(3) only applies to accused persons at a criminal trial. That the right should not be extended to persons appearing at disciplinary hearings and/or before an administrative tribunal. If the framers of the Constitution wanted these provisions to apply to administrative hearings as well, there is no apparent reason why they could not have included this in section 33.

\(^{60}\) Note 31 supra.

\(^{61}\) (1968) 2 All ER 545.
The reasoning that transpires for the judgment of Lord Denning MR in the interlocutory appeal of *Pett v Greyhound Racing Association Ltd*\(^6\) was supported in principle by the Hlophe JP and Brand J in *Hamata v Chairperson, Peninsula Internal Disciplinary Committee*\(^6\), where the courts holds “……unfortunately, the conclusion arrived at by the Master of the Rolls was shortly thereafter held not to represent English law at that time”.

In the continuation of the *Pett* case, Lyell J found that the above quoted statements by Lord Denning MR, relied upon by Farlam, to have deviated from a decision of the *Privy Council in University of Ceylon v Fernando*\(^4\). The judgment of Lyell J, reported as *Pett v Greyhound Association Ltd (No 2)*\(^5\), is summarized as follows:

The plaintiff did not have a right to be legally represented because in the absence of express requirements in the instrument conferring quasi-judicial powers on a domestic tribunal, the tribunal was required only to comply with those elementary principles of fairness which must as a matter of necessary implication be treated as applicable in the exercise of those powers, that is, the principles of natural justice, and, in the present case, legal representation before the local stewards was not essential to a fair dispensation of justice.

The fact that the decision of Lord Denning MR in the *Pett* case\(^6\) had been held not to represent English law was pointed out first by Cilliers AJ in *Smith v Beleggende Outoriteit van Kommandement Noord-Transvaal van die SA Weermag*\(^7\) and then again by Harms JA in *Lamprecht and Another v McNellie*\(^8\).

\(^{6}\) Note 61 supra.
\(^{61}\) Note 55 supra.
\(^{64}\) 1960 (1) All ER 631 (PC).
\(^{65}\) 1969 (2) All ER 221 (QB).
\(^{66}\) Note 61 supra.
\(^{67}\) 1980 (3) SA 519(T).
\(^{68}\) Note 36 supra.
As to the South African authority relied upon by Farlam, that is *Yates v University of Bophuthatswana*\(^{69}\), it appears accurate, according to Brand J that this judgment appears to support his (Farlam’s) submissions, but that it would appear that the judgment does not represent South African law. In *Dabner v South African Railways and Harbours*\(^{70}\), it was contended on behalf of the appellant, a railway employee, that a provision in respondent’s regulations which prohibited a railway employee charged with serious misconduct from being legally represented at a disciplinary held into such charge, was *ultra vires* and thus invalid. The court, however, found that the provision was in fact *intra vires* and valid. In the course of this judgment Innes CJ expressed himself as follows at 598:

No Roman Dutch authority was quoted as establishing the right to legal representation before tribunals other than courts of law, and I know of none.

This dictum has since often been followed and applied in our courts. (*Feinstein and Another v Taylor and Others*\(^{71}\) and *Meyer v Law Society, Transvaal*\(^{72}\)).

Hlophe J and Brand J agreed to the above mentioned authorities, and with the following statement of Page J in *Cuppan v Cape Display Chain Services*\(^{73}\):

It appears to be settled law that where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation, and where the relationship between the parties is governed by contract, the right of the person being subjected to an enquiry arising out of that contract to be legally represented at such enquiry must depend upon the terms if the contract itself.

From this it follows that there is no basis for the declaratory order sought by the applicants in Hamata\(^{74}\), that the provisions of rule 10.2.11(1)(viii)- to the effect

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\(^{69}\) Note 31 supra.
\(^{70}\) Note 5 supra.
\(^{71}\) 1961 (4) SA 554(W).
\(^{72}\) 1978(2) SA 209 (T).
\(^{73}\) Note 47 supra.
that a student may be represented by another student or by a staff member of
the Technikon at a hearing before the IDC- are to be interpreted as not excluding
‘outside’ legal representation. There is also no basis for the alternative
declaratory order that they seek, namely that rule 10.2.11(1)(viii) is invalid for
being in conflict with the constitutional right to procedurally fair administrative
action.

Applicants’ further contention that, in the absence of any provision regarding
representation before the CDC, the constitutional requirement of fair
administrative procedure dictates that a student appearing before that body is
entitled to legal representation, is equally without foundation.

Farlam’s further submissions as to why the applicant was entitled to legal
representation before the IDC and CDC was based on the following statement by
Baxter’s Administrative Law\(^{75}\):

Where oral hearings are granted, legal representation is not an essential
requirement. In unusually complex cases involving complicated evidence
or legal issues, legal representation might be regarded as a \textit{sine qua non}
of a fair hearing, and the flexibility of natural justice would seem to
accommodate this. There a obviously advantages to be gained by legal
representation in certain proceedings, but there is also much to be said for
keeping lawyers out of the administrative process where the adjudicative
process is not essential: lawyers and over-judicialisation tend to go hand
in hand.

On the basis of this statement Farlam contended that the IDC and the CDC erred
in not allowing the applicant to be represented by his attorney. His argument in
support of this contention was that, having regard to the fact that the proceedings
involved a disciplinary hearing, the gravity of the charges, the severity of the
possible sentence and the complexity of the constitutional issue involving the
right to freedom of expression and freedom of the press, it was unfair to limit the

\(^{74}\) Note 55 supra.
\(^{75}\) (1984) at 555-6.
applicant’s choice of a representative to fellow students and to members of the Technikon staff.

The court accepted Baxter’s\textsuperscript{76} exposition of the relevant legal principle relied upon by Farlam. However, the court disagreed that the application thereof to the facts \textit{in casu} justifies the conclusion by Farlam. Although it must have been clear from the outset that the charges against the applicant were serious and that the consequences of a conviction were therefore also potentially serious, the court did not hold that such potential consequences were more serious than those involved in cases such as \textit{Dabner}\textsuperscript{77} and \textit{Cuppan}\textsuperscript{78}, where legal representation was found not to be an essential element of a fair hearing before an administrative tribunal. Moreover, the court disagreed with Farlam’s submission that the factual, legal and constitutional issues involved were unduly complex.

The court further held that where a relationship between parties is governed by contract, then the right to be legally represented at enquiries depended on the terms of the contract. The disciplinary code of the Technikon provided in rule 10.2.11(1)(viii) that:

\begin{quote}
The student may conduct his/her own defense or may be assisted by any student or member of staff of the Technikon. Such representative shall voluntarily accept the task of representing the student.
\end{quote}

In unusually complex cases involving complicated evidence or legal issues, legal representation might be regarded as a \textit{sine qua non} of a fair hearing and the flexibility of natural justice apparently accommodate this. The court found that there were obvious advantages to be gained by legal representation in certain proceedings, but there was also much to be said for keeping lawyers out of administrative process, to avoid over-justification of the process. According to the court the issues involved in this matter, namely the publication of an article with

\begin{footnotes}
\item\textsuperscript{76} Note 75 Supra.
\item\textsuperscript{77} Note 5 Supra.
\item\textsuperscript{78} Note 47 Supra.
\end{footnotes}
apparent false information, alleging various sex related practices at the campus of the Technikon and which were published by a journalist student, were not unduly complex. In fact, the applicants’ argument could well be an illustration of how a relatively simple enquiry might become ‘over-judicialised’. The court also held that where a hearing took place before a tribunal other than a court of law, there was no general right to legal representation. Where oral hearings were granted before a tribunal, legal representation was not an essential requirement.

4.2 RIGHT TO FAIR ADMINISTRATIVE ACTION

The court, in Hamata\textsuperscript{79} also considered the right to fair administrative action in reviewing whether a party may be entitled to legal representation during disciplinary proceedings. The right to administrative justice in terms of section 33 of the Constitution Act (read with item 23(2)(b) of Schedule 6 to the Constitution reads that “administrative action which is justifiable in relation to reasons given for it”. ‘Justified’ in item 23(2)(b) means ‘able to be shown to be just, reasonable or correct’. The Constitution seeks to give expression to fundamental values of accountability, responsiveness and openness, but not purporting to give courts power to perform administrative functions themselves.

The issue of entitlement to legal representation was again raised at the appeal of the Hamata judgment\textsuperscript{80} before a full bench at the court of appeal. In his judgment Marais JA holds that entitlement as of right to legal representation in arenas other than courts of law has long been a bone of contention. And further that the court a quo correctly observed, in Dabner v South African Railways and Harbours\textsuperscript{81}, more than eighty years ago that the court categorically denied the existence of any such absolute right. South African courts have consistently accepted the correctness if that view. Marais JA is of the view that it is not entirely clear from the judgment in Yates v University of Bophuthatswana and

\textsuperscript{79} Note 55 Supra.
\textsuperscript{80} 2000 (4) SA 621 (C).
\textsuperscript{81} Note 5 supra.
others whether the court was holding otherwise or whether its recognition of a legal representation in that case was grounded solely upon an implication arising from the terms of the conditions of service applicable to the applicant. If the former, the decision would have to be regarded as, with respect, an aberrant one. Marais JA held that counsel for the appellants laid no claim to any such general and absolute entitlement and declined to submit that legal representation, whenever sought, is a *sine qua non* to any procedurally fair hearing. The submission was less bold and infinitely less productive of the potential tyranny of artful forensic footwork and heavy accompanying costs to which all major organizations, institutions, voluntary associations and individual might become exposed to, no matter how mundane the issue which arises. The submission was that in the particular circumstances of this case and, more specifically, the nature of the charges and the first appellant’s intended reliance upon constitutionally entrenched freedoms, fairness (according b Marais JA) required that he be allowed “outside” legal representation and that the IDC was vested with a discretion to allow such representation.

Marais JA summarized the view of the IDC in that the rules prohibited it from exercising any such discretion. He responded as follows:

If it was right in so thinking, and because admission as student of Pentech entails a contractual submission to its rules, questions could arise as to the validity of such an absolute prohibition or the enforceability of any waiver (inherent in admission as a student) of even the right to have the IDC exercise a discretion in that regard. If it was wrong in so thinking, those questions would not arise.

In dealing with the last mentioned issue, Marais AJ avers that there are only three conceivable objects which the rule may have been intended to achieve. They all conflict with one another to a greater or lesser degree. They are, whatever the nature of the charge and the possible consequences of it being upheld:

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82 Note 60 supra.
• To prohibit absolutely, any form of representation other than that for which provision is made in the rule;

• To grant tacitly, an absolute right to be represented by a lawyer of one’s choice and to extend expressly the right to representation to encompass representation even by a non-lawyer, provided only that such non-lawyer is a student or a member of the staff of Pentech; or

• To grant, an absolute right to representation by a student or member of staff of Pentech irrespective of whether such person is a lawyer; to deny an absolute right to representation by a lawyer of one’s choice if the latter is neither a student at, or a member of the staff of, Pentech; but to allow the IDC, in exercise of its discretion, to permit representation by such a lawyer.

Marais JA is of the view that the correct choice from the above mentioned possibilities could only be made by applying the laid down principles of interpretation as well as the relevant protections as contained in the Bill of Rights. Marais JA refers to the applicable sections in the Bill of Rights and holds (in concurrence with numerous decisions referred to in this document), that the right to a fair trial and to legal representation at the trial is limited to an accused in criminal proceedings and should not be extended to administrative tribunals.

He also refers to section 33 and item 23(2) of Schedule 6 of the Constitution, and holds that although these sections deal with administrative action, that the sections are silent on the issue of a right to legal representation.

In national legislation\textsuperscript{83}, as required by section 33(3) of the Constitution, to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to be given written reasons where rights have been adversely affected by administrative action, there is an omission of the explicit recognition of a right to legal representation.

\textsuperscript{83} Promotion of Administrative Justice Act 3 of 2000.
Instead, section 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 recognizes and reaffirms what had long been axiomatic in the common law, namely, that “fair administrative procedures depends on the circumstances of each case”. Section 3 of the Act makes provision for legal representation only in a “serious or complex” case in which, “in order to give effect to the right to procedurally fair administrative action”, and administrator decides, in the exercise of a discretion, to grant an opportunity to obtain legal representation.84

There appears to be a contrast between certain rights spelt out in section 3(2)(b) which “must” be given and the “opportunities” spelt out in section 3(3) which “may, in (the administrator's) discretion, also be given. The opportunity of obtaining legal representation appears to be one of the latter. It is further clear than neither of these rights nor the opportunities is cast in stone. “If it is reasonable and justifiable in the circumstances” section 3(4)(a) allows an administrator to depart from them.

Section 3(2)(b) provides that in order to give effect to the right to procedurally fair administrative action, and administrator must give a person “a reasonable opportunity to make representations”. These “representations” are not defined and may be a recognition of the audi alteram partem principle, and read in conjunction with subsection 3(a) which deals with legal representation in serious and complex cases, it may require the assistance of a legal practitioner to allow the employee to conduct his defense.

Section 3(1) of the Act 3 of 2000 is clear in stating that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. To promote or give effect to this general provision, the legislature allowed a discretionary power to the designated administrator to depart from any of the requirements referred to in subsection (2), if such a departure would be reasonable and justifiable in the circumstances.

84 Section 3(3)(a) of Act 3 of 2000.
This may entail that the administrator in an administrative action may allow legal representation to promote reasonableness and fairness.

The administrator may also be empowered to follow a procedure which is fair but different from the provisions of subsection (2)\textsuperscript{85}

Administrative action is defined in section 1 (b) of Act 3 of 2000 as the exercising of a public power or performing a public function in terms of an empowering provision which has a direct, external legal effect, by a natural or juristic person or an organ of the state.

Public includes any group or class of the public\textsuperscript{86}.

Marais JA recognizes that with the passage of the years there has been a growing acceptance of the view that there will be cases in which legal representation may be essential for a procedurally fair administrative proceeding. In saying this, he emphasizes the most general usage of the words “administrative proceeding” to include, inter alia quasi-judicial proceedings. He continues:

Awareness of all this, no doubt accounts for the cautious and restrained manner in which the framers of the Constitution have dealt with the subject of legal representation in the context of administrative action. In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation, but, even then, only the cases where it is truly required in order to attain procedural fairness.

Marais JA holds that any rule purporting to compel such an organ to refuse legal representation, no matter what the circumstances might be, and even if they are such that a refusal might very well impair the fairness of the administrative proceeding, cannot pass muster in the range of issues which could conceivably

\textsuperscript{85} Section 3(5) of Act 3 of 2000.
\textsuperscript{86} Section 1 of Act 3 of 2000.
arise in disciplinary proceedings at Pentech. The consequences of the findings which could be made in such proceedings are such that there may be a need for the kind of flexibility to which Marais JA has alluded in this judgment. Marais JA reiterates that the mere fact that administrative organs may be faced with the task of making decisions does not warrant the exclusion of legal representation. Legal representation should only be considered where decisions, considering all the relevant circumstances, cannot fairly be made without allowing legal representation.

Marais JA reverts to both the pre-constitution common law as well as the relevant sections in the Constitution in accepting that proceedings of a disciplinary nature should be procedurally fair whether or not they can be characterized as administrative and whether or not an organ of State is involved. He continues by stating that if, in order to achieve such fairness in a particular case, legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it to exercise its discretion unless it has plainly and unambiguously been deprived of any such discretion. If it has, the validity in law of the deprivation may arise but, according to Marais JA, no such deprivation exists in the rules of Pentech in the Hamata case.

In conclusion the court of appeal in *Hamata*\(^\text{87}\) held that both the IDC and the CDC had a discretion to allow legal representation, but that they failed to exercise the mentioned discretion.

### 4.3 RIGHT TO EQUALITY

Section 8(1) of the Constitution provides that every person shall have the right to equality before the law and to equal protection of the law. One may therefore

\(^{87}\) Note 55 supra.
conclude in circumstances where one of the parties, albeit not legally qualified, is more experienced in labour law or is represented by a person more experienced in labour law (trade union representatives, although not always legally qualified, are often well-versed in this area of law and, as such, may well derive an unfair advantage in relation to more inexperienced opponents), the other party may have grounds for arguing that in the absence of legal representation his or her right to equality before the law has been infringed.

As explained in Van Wyk equality is, according to Aristotle, a matter of treating like cases alike and unlike cases differently in proportion to their likeness or difference. Equality is not simply a matter of likeness. It is, equally, a matter of difference. That those who are different should be treated differently is as vital to equality as is the requirement that those who are like are treated alike. In certain cases it is the very essence of equality, according to Aristotle, to make distinctions between groups and individuals in order to accommodate their different needs and interests.\(^88\)

The interpretation of ‘equality before the law’ and ‘equal protection of the law’ must give effect to the purposes of the Constitution and the values which support it. Hence it must take account of a history of inequality and oppression and the need for reparation and reconstruction.

In this context, the minimum content of ‘equality before the law’ is equality of process. The Canadian court said in \(R\) \textit{v} \textit{Turpin}\(^9\), equality before the law

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\(^9\) (1989) 1 SCR 1296.
Conclusion

Is designed to advance the value that all persons be subject to the equal demands of the law and not suffer any greater disability in the substance and application of the law than others. This value has historically been associated with the requirements of the rule of law that all persons be subject to the law impartially applied and administered.

Equality before the law requires, according to Chaskalson et al in *Constitutional Law of South Africa*, that each person is accorded equal concern and respect both in the formulation and the application of the law. It therefore requires equality of representation on all law making bodies. It requires that the rules of law should in principle apply equally to all persons. It also requires executive organs of the state and administrative bodies to be even-handed in the enforcement and administration of the law, and the application of policy.

The guarantee of equality entitles everybody, at the very least, to equal treatment by courts of law and administrative bodies. Equality before the law means, according to Chaskalson et al, that those who come before the courts of the land are assured of fair and impartial adjudication.

Equal protection of the law embraces the substance and content of the law. It encompasses laws which afford benefits as well as laws which prohibit or regulate certain activities. It also opposes subordination and disadvantage in and through the law.

The essential characteristics of the adversarial system is that the onus rests on the litigant to advance his case for a decision to be made by a judicial officer who remains passive throughout the proceedings.

5 CONCLUSION

Given the powers entrusted to a commissioner at both arbitration and conciliation proceedings, it is submitted that it is not enough to rely on the common-law rule which permits a tribunal to exercise a discretion to allow legal representation in
situations where complex issues arise. Rather, such representation should be statutorily authorized in all proceedings, complex or simple, before the commission. Alternatively, and bearing in mind that the LRA grants parties the right to legal representation in situations where no other party objects, it is submitted that a similar provision be incorporated to allow for legal representation at all conciliation and arbitration proceedings.

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. It is submitted that, in all the circumstances, the disadvantages of non-representation outweigh the alleged benefits. There is a clear shift in the discretion of acting fairly. Acting fairly, represents a substantive change in the approach of the courts to applying principles of natural justice. Fairness, appears to promote a broader and more flexible concept than the traditional rules of natural justice. This offers the courts the opportunity to look behind procedural rights and consider whether the outcome was fair.

The right to a hearing is one of the principles of natural justice. This may take a number of forms: the right to put one’s own side of a case; the right to be consulted; the right to make representations; the right to submit reasoned arguments rebutting any allegations etc. Why should there also not exist a right to legal representation as an integral part of the right to a hearing? Does fairness not make this imperative? In *Balomanos v Jockey Club of South Africa* Claassen J declared: “In all these circumstances it would have been fair to have granted the applicant the advantage of legal assistance. The rules, however, in my opinion speak a different voice”. Has fairness, as expounded by *Administrator, Transvaal v Traub* not made it possible for cases like *Balomanos*, to be decided differently?

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90 1959 (4) SA 381 (W).
91 1989 (4) SA 731 (A).
Conclusion

There may be administrative organs of such nature that the issues which come before them are so mundane and the consequences of their decisions for particular individuals so insignificant that a domestic rule prohibiting legal representation would neither be unconstitutional nor be required to be “read down” (if its language so permits) to allow for the exercising of a discretion in that regard. On the other hand, there may be administrative organs which are faced with issues, and whose decisions may entail consequences, which range from the relatively trivial to the most grave.

One of the fundamental questions to be addressed is whether the recognition of a general entitlement to legal representation would impinge upon the practice that tribunals are masters of their own procedure and to what extent does this displace any discretion vested in the tribunal? Recognition of this entitlement does not constitute too radical an infringement on the independence and integrity of the powers and the competence of a tribunal: on the contrary, according to Buirski, “it is arguable that this nuanced recognition may in the long run prove to be the most effective manner in which to dispose of these matters.”

The above mentioned view may even be considered in co-existence with the practice that the affected party can choose to be represented by a person other than a legal representative. It would further be open for a tribunal to object to legal representation, on the grounds that the dispute does not concern complex matters of law and evidence. Buirski suggests that where a tribunal exercises its discretion and does not permit legal representation, the affected party can also approach a court for relief. The approach suggested here retains this practice of curial determination over the permissibility or not of legal representation. The fact that a court will have the last say on the question of legal representation will ensure that the interest of bodies like tribunals is protected. As

92 Note 3 supra.
93 Note 3 supra.
such, this does not amount to a surrendering of discretion but to a willingness to re-define and to re-interpret legal concepts and practices in tune with our reality.

A further point of contention is the defining of right to legal representation within the context of the LRA. A legal representative is defined in section 213 of the LRA as “including any person admitted to practice as an advocate or an attorney in the Republic of South Africa.” Representation by a legal practitioner had been criticized for making the process legalistic and expensive. However, many medium and large organizations, including government departments and parastatals have in-house legal practitioners in their employ, and are represented at disciplinary and conciliation proceedings by these individuals. The last mentioned practitioners are in many instances individuals with legal degrees, and experienced as ex-practicing advocates or attorneys. Many of these individuals have completed postgraduate qualifications in labour law. However, these individuals are exempted from the definition of a legal representative, and may represent the employer at the abovementioned proceedings. This once again raises the issue of equal protection by the law and reasonable and fair administrative action. Is it fair for a blue collar employee, uneducated in law, to present his case at a tribunal whilst being contested by an experienced legal and labour practitioner, where the ultimate sanction may entail the sanction of dismissal? The abovementioned, unbalanced status quo will prevail even if the merits or facts of the case are uncomplicated and less serious.

On the same notion it makes little sense to exclude legal representation, but allow representation by a fellow employee or union representative in cases where the latter may be legally qualified, but not falling within the ambit of section 213 of the LRA.
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