

## **Disrobed – Digital labour proceedings during the lockdown**

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Since 1995, South Africans have become accustomed to life under a constitutional democracy. The Constitution of the Republic of South Africa, 1996 is the supreme law and judicial authority vests in independent and impartial courts and tribunals. The rule of law has been a beacon of hope for a populace plagued by corruption and state capture, deepening poverty, rising unemployment and inequality, all of which have been starkly exposed by the Coronavirus.

Throughout the world, the Covid-19 pandemic has forced people to revise many aspects of life previously taken for granted. The courts have not been immune from the pandemic. Access to courts and tribunals like the Commission for Conciliation, Mediation and Arbitration and bargaining councils to resolve disputes by traditional means in fair public hearings has been blocked by attempts to quell the spread of Covid-19. All courts and tribunals function under the Constitution, legislation and rules of practice with which legal practitioners have become accustomed. These forums have now been forced

to swiftly adapt and innovate to discharge their functions as best they can under the lockdown.

The most recent directions from the Department of Justice and Correctional Services deal with the 'lockdown' move to Alert Level 3, and must be read together with directives issued by the Chief Justice and Heads of Court. The CCMA has also issued a set of Guidelines for Commissioners and Standard Operating Procedures for managing referrals. Personal safety and flexibility are a repeated refrain, with increased reliance on technology and support for alternative dispute resolution mechanisms like mediation. For example, open-court oral hearings in motion proceedings have been jettisoned in favour of e-mail submissions and written argument. Where oral hearings are permitted or required, video conferencing must be used. For trials, a joint practice note must be submitted by the parties after a special pre-trial conference, containing details of the logistics of the proposed process. Judges have broad discretion to decide whether evidence will be admitted via video conference or on affidavit and whether any aspect of the trial will be conducted in court.

This has forced legal practitioners to adapt. In addition to trying to keep abreast of a flood of Covid-19-related regulations, work permits and travel restrictions, practitioners have had to fast forward into the technological era. On the one hand, the pandemic presents a unique opportunity to permanently alter outmoded legal

proceedings and to advance mediation and other forms of dispute resolution – literally to discard the robes that epitomise the formalities associated with litigation. On the other hand, justice may be frustrated by cyber-security risks, possible manipulation of virtual proceedings and other unscrupulous dodges. For example, how can credible credibility findings be made if witnesses hide behind technological malfunctions, have genuine discomfort with technological platforms or if witnesses are helped by prompts on hidden screens? Will a presiding officer's failure to consider technical difficulties experienced by an unsuccessful party in an electronic hearing constitute a ground for review or appeal?

These developments will require special advocacy training for legal practitioners, candidate legal practitioners and law students. The Inns of Court College of Advocacy has already published 'Principles for Remote Advocacy' (see <https://www.icca.ac.uk/principles-for-remote-advocacy-2/>) and legal practitioner associations and the Legal Practice Council of South Africa are likely to follow suit. Judicial education and training, including the way in which aspirant judges and commissioners are taught to deal with evidence and processes, will also require updating.

Given the grave predictions of job losses occasioned by Covid-19 (see <https://juta.co.za/press-room/2020/05/25/juta-covid-19-unlocking-the-workplace-safety-first-issue-10/>) it is unsurprising that referrals to the CCMA have rocketed. The CCMA has recorded 28 000 referrals in April and May alone. Add to this the backlogs

caused by the lockdown and concern whether the labour courts, the CCMA and bargaining councils will be able to cope becomes understandable. Shortcuts will be inevitable. But they can't be at the expense of justice and fairness to both parties. When or whether legal proceedings will return to 'normal' is anyone's guess. In the meantime, digital platforms and other electronic devices offer the only way to balance serving the cause of justice with the safety of judicial officers and commissioners, support staff, legal practitioners, witnesses, litigants and the public at large. The use of the cloud also has significant cost-cutting advantages. So if problems with remote litigation can be overcome, its current use may prove to be a blessing in disguise.

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