

The Labour Relations Disputes Resolutions system: Is it Effective?

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CHAPTER 1

RESEARCH PROPOSAL

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1. Background

The relationship between employees and employers is often conflictual due to their different interest in the employment relationship. Conflict is normal in any kind of relationship. One of the factors contributing to this conflict in the employment relationship is the unique manner in which this contract is established. Under normal circumstances, a contract is entered into on the basis that parties have equal rights and power to regulate their relationship.¹ However, in employment contracts, the employee is largely at the mercy of the employer.² It is true that for any country to stimulate economic growth and to maintain stability, it must have an effective structure to deal with labour disputes. To this extent, government must have an efficient dispute resolution mechanism to manage the different interests of the two groups.³

South Africa is not an exception to this problem. The Labour Relations Act⁴ (LRA) was the first instrument of its kind to address this key issue. One of the fundamental reasons for enacting the Act was to establish an effective dispute resolution system.⁵ In light of the current labour unrest in South Africa, it has become important to assess whether the dispute resolution system, as regulated by the LRA is effective as per its mandate.

2. History to the Problem Statement

The miracle of 1994 is well documented. Elections were held and South Africa became a democratic state. The new government established a task team to overhaul the labour laws as a whole and to deal with short comings created by the apartheid government.⁶

Important for the purpose of this paper are the problems identified by the task team with regards to the 1956 Act. It identified the ineffective conciliation machinery and procedures and also the expensive dispute resolution system as problems to be attended to.⁷

¹ Van Jaarsveld and Van Eck *Principles of Labour Law* (1998) 67.

² J Grogan *Collective Labour Law* (1993) 1.

³ International training centre of the ILO, *Labour Dispute Systems, Guideline for improved performance*, 2013.

⁴ Act 66 of 1995 in force since 1996.

⁵ S 1(d)(iv).

⁶ *Explanatory Memorandum* (1995) 16 ILJ 281.

⁷ *Idem* 285.

One point of critique against the Industrial Court was that it did not adjudicate disputes of interest.⁸ Furthermore, its jurisprudence on the disputes of rights was uneven and at times contradictory.⁹

In summary, in dealing with the problems of the dispute resolution system, the task team established that the dispute resolution procedures were ineffective. They were lengthy, complex and full of technicalities. Instead of minimising disputes, they fuelled industrial action.¹⁰

Following the recommendations of the task team, the old Labour Relations Amendment Act¹¹ was replaced by the Labour Relations Act in 1995.¹² As stated earlier, the LRA states that its objective is to establish an effective dispute resolution system.¹³

Chapter 7 of the LRA deals with dispute resolution. The intention of the legislator is clear. The main purpose of this chapter is to establish and maintain an effective dispute resolution system as stated in the purpose of the Act.¹⁴

The LRA established the Commission for Conciliation, Mediation and Arbitration (CCMA).¹⁵ The main core business of the CCMA is to resolve disputes through conciliation and arbitration. The Act also created the Labour Court and the Labour Appeal Court.¹⁶ For the purposes of this paper, the Labour Court has powers to review the awards issued by the arbitrators at the CCMA.¹⁷ The Labour Appeal Court is the highest court in relation to matters under its jurisdiction.¹⁸

The Constitution is the supreme law of the country; consequentially all legislation is subject to it.¹⁹ This means that the Constitutional Court is the highest court of the land, thus appeals of the Labour Appeals Court will lie at the Constitutional Court.

⁸ Du Toit *et al Labour Relations Law* 4th ed (2003) 11.

⁹ Finnemore *Introduction to Labour Relations in South Africa* (2006) 33.

¹⁰ S 112.

¹¹ Act 9 of 1991.

¹² Act 66 of 1995.

¹³ S 1(d)(iv).

¹⁴ Ss 112-179.

¹⁵ S 112.

¹⁶ Ss 151 and 167 respectively.

¹⁷ S 145.

¹⁸ S 167(3).

¹⁹ 1996, s 2.

Taking into account the dispute resolution system as provided for by the LRA and the Constitution, one needs to address the question whether the shortcomings of the 1956 Act, as identified by the task team, have been resolved by the new dispute resolution system implemented by the 1995 LRA.

3. Research Question

The aim of the paper is to critically evaluate the effectiveness of the dispute resolution system in the light of the objectives of the LRA. The focus of the paper will be limited to resolution of cases referred to the CCMA and subsequently referred to labour courts for review and appeal. Scrutiny will be on provisions of the LRA, rules of the CCMA and courts as to how disputes must be dealt with by these institutions established by the LRA.

4. Significance of the Study

The significance of the study is to identify advantages and weaknesses of our dispute resolution system. Effective dispute resolution systems will contribute to positive economic development and social justice. From time to time, an analysis of how effective our system is must be visited, with the view of coming up with proposals to strengthen the system. As already stated, the task team found that the dispute resolution system of the 1956 Act actually perpetuated unlawful industrial actions.²⁰ Research on this topic may be useful to curb the recurrence of such actions.

5. Research Methodology

In answering the question, a sociological approach in determining the strengths and weaknesses of the system was followed. Empirical evidence and critical analysis on the subject will be used to ascertain the effectiveness of our dispute resolution system. In this regard, research was done on how the cases enter into the system, and on the process to get them finalised in these institutions. Furthermore, a comparative study with the United Kingdom (UK) will also be done to assist this paper to achieve its objective. The strengths and the weaknesses of these two jurisdictions were analysed with a view of providing a solution. The effectiveness of the institutions created by the LRA will be determined using these approaches. Lastly, the positive and the negative that comes from the research will be highlighted in order to arrive at a just conclusion.

²⁰ *Supra* note 6 at 281.

6. Proposed Structure

6.1 Introduction

It is now 18 years since the LRA was enacted. One of the deficiencies of the old LRA was that its dispute resolution system in terms of implementing was disadvantaged by expensive and lengthy dispute resolution process.²¹ Pertaining to the LRA, 18 years later, one must consider whether the new dispensation has managed to be inexpensive and expedient as it intended to be.

The essence of this paper would reflect on the consequences of an effective or ineffective dispute resolution system on both parties. Employers' and employees' failure to adhere to the LRA principles indicate the degree of frustration with the law and rules created by the LRA. This is especially true with regard to dismissal law. Employers may opt to dismiss employees without following procedure; this attitude can be perceived as being rebellious against the system.²²

On the other hand, employees, out of frustration with the manner in which the employer treats them, may embark on disorderly conduct and ignore prescripts of labour law in order to compel the employer to succumb to their demands.²³

The increase in the number of disputes referred to the labour dispute forum, also requires this analysis, because if left unattended, the country might be left with a clogged up system that is not moving, and the purpose of the LRA would then be defeated.

6.2 International Labour Organization (ILO)

South Africa is a member of ILO and as such is expected to comply with the standards set by ILO.²⁴ Normally, for a country to be bound by a convention, it must ratify the said convention. South Africa may be regarded as a *sui generis* in this instance because the LRA binds South Africa to adhere to such standards.²⁵ In this regard, South Africa must comply with ILO standards when endeavouring to deliver an effective dispute resolution system.

²¹ *Supra* 6.

²² *Mtsweni v Izikhathi Security Services (Pty) Ltd* 2011 12 BALR 1316 (CCMA).

²³ *Platinum Mile Investments (Pty) Ltd v SATAWU* 2010 31 ILJ 2037 (LAC).

²⁴ Smit and BPS Van Eck "International perspective on South Africa's unfair dismissal law" 2010 XLIISA 48.

²⁵ S 1(b) of the LRA.

For the purposes of this paper, one of the important ILO Conventions to be considered is Convention 158, which deals with Termination of Employment at the initiative of the employer. Of specific importance is Article 8 of the C185, which deals with procedures that an employee can follow if he wants to appeal his dismissal from the workplace. South Africa has not ratified this convention.²⁶

In summary, the Article states that such an employee must be entitled to appeal against his or her dismissal at an impartial body such as a court, labour tribunal or an arbitration committee. Furthermore, the article provides that a worker may be deemed to have waived his right of appeal if he has not exercised this right within a reasonable time.²⁷

It is without a doubt that the LRA complies with the standards as set out above by Convention 185. In the case where an employee is dissatisfied with his or her dismissal, s/he can refer a dispute to the CCMA. In the case where any one of the parties is not satisfied with the CCMA award, that party can approach the Labour Court for a review. If still not satisfied, the party can appeal at the Labour Appeal Court and the Constitutional Court, provided that the matter raises a constitutional question.

Another important instrument of the ILO is the Voluntary Conciliation and Arbitration Recommendation.²⁸ This Recommendation encourages member states to have conciliation and arbitration procedures in their dispute resolution system. It can also be confirmed that South Africa complies with this recommendation as will be seen later under the heading of “Commission for Conciliation, Mediation and Arbitration”. As to whether this is effective, will be discussed in more detail under the headings of the CCMA and the Courts.

It is suggested that an effective dispute resolution system should have procedures that are clear, uncomplicated and informal, that conciliations and arbitrations should avoid, as far as possible, the appearance and practice of court proceedings.²⁹ The paper will focus on relevant issues that may assist to determine the effectiveness of the dispute resolution system under the LRA.

²⁶ *Supra* note 24 at 49.

²⁷ Article 8(1) and (3) of C158.

²⁸ 1951, (No 92).

²⁹ *Supra* note 6 at 284.

6.3 Commission for Conciliation, Mediation and Arbitration (CCMA)

It is undisputed that the CCMA upholds the democratic value of social justice and human dignity of employees,³⁰ more importantly those who are dismissed.³¹ Furthermore, the LRA created the CCMA to be a pillar of the new dispensation.³²

The establishment of the CCMA was supported by labour, government and business. Part of its mandate was to generate a credible system, to move labour relations from a strictly adversarial system to a system mixing the latter and inquisitorial system in order to provide expeditious resolution of disputes by means of conciliation and arbitration where necessary.³³

On the face of it, it will seem that the purpose of the CCMA is met, when considering the wording of the LRA. In this respect the LRA provides time periods in which matters must be referred to the CCMA and under what conditions conciliation and arbitration must take place.³⁴ Further, it gives commissioners time frames in which they must provide awards to the parties.³⁵

The CCMA services are free of charge, which means that employees incur no costs in order to obtain assistance from the CCMA. In addition, the cost aspect furthermore entails that no legal representatives are allowed during conciliation. Employees need not get legal representatives during arbitration and they can also be represented by their unions.³⁶

Due to its accessibility, the CCMA received an unexpected volume of referrals that resulted in a strain on its resources; as a result its effectiveness was compromised.³⁷

The guideline, meant to guide parties on how to conduct conciliation and arbitration, has also been used in most cases as a yardstick and no longer as a guideline. As a result, this has created a situation where arbitrations have become technical and court like.³⁸ The use of legal representatives had also not assisted this situation.³⁹

³⁰ Ss 1(a) and 5(3) of the LRA.

³¹ Benjamin "Conciliation, Arbitration and Enforcement: The CCMA's achievements and challenges" 2009 ILJ 26.

³² Benderman "An analysis of the problem of the Labour Dispute Resolution System in South Africa" 2006 Volume 6 AJCR 181.

³³ *Idem* 83.

³⁴ S 135.

³⁵ S 138.

³⁶ *NUM obo Mabote v Kalahari Country Club* (unreported judgment C1010/12 dated 2013-6-21).

³⁷ *Supra* note 31.

³⁸ *Ibid.*

³⁹ *Ibid.*

These are the issues that this paper will deal with in examining the effectiveness of the CCMA. In addition, the important issue of enforcements of the CCMA awards will be examined in order to provide extensive assistance on how the dispute resolution system can be improved where necessary.

6.4. The Courts

In terms of the LRA, the Labour Court has the same standing and status as the high courts in relation to matters within its jurisdiction.⁴⁰ Therefore, it is important to note the hierarchy of South African Courts as affirmed by the Constitution:

“(a) The Constitutional Court, (b) The Supreme Court of Appeal, (c) the High Court, including any High Court of Appeal that may be established by an Act of Parliament to hear appeals from High Courts and (e) any other court established or recognized in terms on an Act of Parliament, including any Court of Parliament, including any Courts of status similar to either the High Court or the Magistrates Court.”⁴¹

Even though the LRA states that the Labour Appeal Court is a superior court with the same standing as the Supreme Court of Appeal,⁴² this unfortunately was not the case. In light of the Constitution’s provision that the SCA is the highest court of appeal, except in Constitutional matters, LAC decisions were still subject to appeal at the SCA.⁴³

It will seem that the intention of the LRA drafters was to afford the LAC same jurisdiction as the highest court of appeal, *albeit* in matters relating to labour law. However, failure to pay attention to the constitutional text has allowed a stumbling block to have labour disputes resolved speedily, this is because a labour matter from the Labour Court will have to be heard by two appeal courts before it can be finalised or referred to the Constitutional Court.⁴⁴

This issue seems to have been laid to rest by the passing of the Constitution’s Seventeenth Amendment Bill into an Act on 1 February 2013. This Amendment has taken away the jurisdiction of the SCA from hearing appeals on labour and competition matters.⁴⁵

⁴⁰ S 151.

⁴¹ S 166.

⁴² S 167(3).

⁴³ S 168(3), see also *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC).

⁴⁴ Van Eck “The Constitutionalisation of Labour Law: No place for a superior Labour Court in labour matters (part 2): erosion of the Labour Court’s jurisdiction” 2006 (*obiter*).

⁴⁵ Constitution Seventeenth Amendment Act, 2012.

Despite the issue of appeal courts, the Labour Court came under heavy criticism for the manner in which it operates. Parties are allowed to extend matters for long periods before pleadings are closed. The Labour Court has been accused of delaying the resolution of labour matters and judgments.⁴⁶ This situation seems more like *de ja vu* as these are the same issues that were raised against the previous Industrial Court.

6.5 Analysis

In light of the fact that the LRA has been in operation for about 17 years, and we still encounter the same problems as we did to prior to its enactment, it is inevitable that a number of disputes are still to clog up labour dispute forums. As it is, the number of referrals received by the CCMA per year far exceeds the expectation that was formulated.⁴⁷

The CCMA's accessibility to the public is no doubt a contributing factor to the number of referrals; that is in any event one of its objectives. Even though the number of referrals can be a challenge to the CCMA, this may simply need further administrative capacity for the CCMA.

As part of their core functions, the commissioners must be aware that they have the duty to resolve disputes speedily and avoid conducting the CCMA in a court like manner. There may be a need to rework Schedule 8 Guidelines in order to do away with legalism at the CCMA. Our dispute resolution system can still maintain the ILO standards without being too legalistic.⁴⁸

The situation was clarified by the recent case, which held that the CCMA rule limiting legal representation in cases of dismissal on account of misconduct and incapacity is constitutionally valid.⁴⁹ This came after the CCMA appealed an earlier ruling declaring the rule constitutionally invalid.⁵⁰

Even though our courts have developed a fine jurisprudence in developing our labour law, they have also been the cause of problems as they allow legal practitioners to postpone matters; some judges also take long to release judgments.⁵¹ In this regard, one might suggest that Court

⁴⁶ Basson *et al Essential Labour Law* 5th ed (2009) 366.

⁴⁷ Benjamin "Conciliation, Arbitration and Enforcements: The CCMA's Achievements and Challenges" (2009) 30 ILJ 26.

⁴⁸ *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 9 BLLR (LC).

⁴⁹ *CCMA v The Law Society of Northern Provinces* (005/13) 2013 ZASCA 118.

⁵⁰ *The Law Society of Northern Provinces v Minister of Labour* 2012 33 ILJ 2798.

⁵¹ Myburgh SC & Maddern "SASLAW report on survey on reserved judgments" http://www.saslaw.org.za/index.php/2012-conf/2012-papers_2012-07-30 (accessed 2015-02-19).

Rules or the relevant provisions of the LRA may be amended to regulate strict deadlines on time periods. These amendments may have a positive effect on the case management system.

6.6 Conclusion

As stated earlier, South Africa is a young constitutional democracy which is still in the process of developing its laws to reach international standards. Unfortunately, unrest affecting the economy and the labour market will force the country to re-look at the effectiveness of its dispute resolution system. The prolonged and often violent strikes are some of the examples indicating a certain level of unrest in the labour market.⁵²

It is unfortunate that at times, employees and employers flout the labour dispute forums for their convenience. It is in this regard that alarms have been raised by the critics. However, wrong or right these critics may be, there is a room to improve our dispute resolution system. The Constitution's Seventeenth Amendment Act is a step in the right direction.

The paper will deal with efficiencies and inefficiencies of our system, main focus being the CCMA and our courts in this regard. The essence of the paper is to contribute towards a better and more effective dispute resolution as envisaged by the LRA.

⁵² Rycroft "What can be done about Strike-Related Violence?" 2014 *International Journal of Comparative Labour Law and Industrial Relations*, 30 Issue 2 199-2160.

CHAPTER 2

SOUTH AFRICAN POSITION REGULATING THE LABOUR DISPUTE RESOLUTION SYSTEM

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2.1 Introduction

The modern global economy and active resistance against human rights abuse resulted in most countries reviewing their labour dispute resolution system.⁵³ However, the situation in South Africa was exacerbated by the unfortunate history of apartheid.

The Industrial Relations Act was the first legislation that created the dispute resolution system in South Africa; the mere fact that it excluded blacks from its coverage is reason enough to understand its inefficiency. Furthermore, it was established to deal mainly with disputes of interest.⁵⁴ In 1956, the Act was amended to create arbitration for job reservation disputes.⁵⁵

As things stood, when the new democratic era was ushered in, labour legislation did not provide for adequate mechanisms to deal with collective and individual relationships.⁵⁶ Accordingly, there was a need to overhaul the entire labour law regime that presided during the apartheid era.⁵⁷

The Industrial Relations Act was replaced by the Labour Relations Act of 1956. Apart from covering black people, this legislation created the industrial courts, which operated in a complex and unsystematic manner.⁵⁸

Ultimately, the new democratic dispensation, in line with the Constitution of 1996, enacted the Labour Relations Act.⁵⁹ One of the objectives of this Act is to promote effective resolution of labour disputes.⁶⁰ Importantly, there was an amendment to this Act, which affected the dispute resolution system.⁶¹ Therefore, this chapter will examine tools and structures created by the current LRA regime for the purposes of determining the effectiveness of the system.

2.2 Critical Analysis of the Contemporary Position on the Labour Dispute Resolution System

2.2.1 Introduction

⁵³ *Supra* note 1.

⁵⁴ Borat "Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An analysis of CCMA Data" 2007 University of Cape Town, DPRU.

⁵⁵ *Ibid.*

⁵⁶ *Supra* note 6 at 282.

⁵⁷ *Idem* 278.

⁵⁸ *Idem* 285.

⁵⁹ *Supra* note 12.

⁶⁰ *Supra* note 13.

⁶¹ Act 6 of 2014.

The new dispensation introduced fundamental reforms to South Africa's labour law regime. A new Constitution was enacted,⁶² and the country re-joined the International Labour Organization on 26 May 1994.⁶³ The Labour Relations Act (LRA)⁶⁴ came into effect on 11 November 1996⁶⁵ to give effect to, and regulate, the fundamental rights conferred by section 27 of the Interim Constitution, Act 200 of 1993.

This chapter will analyse and contextualise the effects of these tools in creating or developing an effective dispute resolution system as envisaged by the LRA.

2.3 The 1996 Labour Relations Act and the 2014 Amendments

2.3.1 The Commission for Conciliation, Mediation and Arbitration

The LRA is arguably the most critical piece of legislation in current labour law. It establishes labour dispute resolution forums, and regulates time frames and processes to facilitate such disputes to these forums. These institutions are the Commission for Conciliation, Mediation and Arbitration (CCMA) and the labour courts (Labour Court and Labour Appeal Court). The CCMA has the power to license private agencies and bargaining councils to perform any or all of their functions.⁶⁶ This paper is limited to the work of the CCMA.

The LRA establishes the CCMA as a juristic independent body, which is funded by the state.⁶⁷ The CCMA occupies a central role in labour disputes in that almost all disputes must be referred to it for conciliation before the matter goes for arbitration or adjudication at the Labour Court.⁶⁸

Conciliation is a process whereby a neutral third party, the commissioner in the case of the CCMA, assists parties to a dispute, to resolve their differences and reach their own mutually acceptable, enforceable and binding agreement.⁶⁹ The conciliator helps the parties to develop

⁶² 1996.

⁶³ Van Niekerk *et al Law @ work* 1st ed (2008) 20.

⁶⁴ *Supra* note 4.

⁶⁵ Du Toit *et al Labour Relations Law* 5th ed (2006) 28.

⁶⁶ *Supra* note 54 at 3.

⁶⁷ *Idem* at 5.

⁶⁸ Grogan *Workplace Law* 10th ed (2009) 428; see also section 115.

⁶⁹ *Ibid.*

options, consider alternatives and reach a settlement agreement that will address the parties' needs. In a case where the dispute is not resolved, the matter is then referred to arbitration or adjudication.⁷⁰

On the other hand, arbitration involves the use of a third party to settle the dispute by making a final and binding decision by way of an award; the award will not be mutually acceptable compared to the conciliation process.⁷¹

This paper mainly focuses on the efficiency of the system in dealing with unfair dismissal and unfair labour practices,⁷² as these are the main disputes referred to the CCMA.⁷³ In fact, Benjamin also states that 80 % of cases referred to the CCMA are unfair dismissal disputes.⁷⁴ It is for this reason that the paper is limited to this category of cases as they represent a significant portion on the dispute resolution system.

The LRA further distinguishes between dismissal based on operational requirements, misconduct or capacity⁷⁵ on one hand, and one labelled as automatically unfair dismissals.⁷⁶ The reference to this distinction is important as the process dealing with the two differs slightly.

The rationale for automatically unfair dismissals is to prevent or deter employers from infringing rights conferred on employees by the Act.⁷⁷ The sanction for infringing such a right is curbed at 24 months by the LRA, while the other forms of dismissals are curbed at 12 months.⁷⁸ After conciliation of a dispute, an automatically unfair dispute must be referred to the Labour Court instead of arbitration. Only the Labour Court can give the maximum compensation of 24 months.⁷⁹

After dismissal, the employee has 30 days to refer the dispute to the CCMA and in unfair labour disputes, the employee has 90 days to refer.⁸⁰ The latter must appoint a commissioner who

⁷⁰ Du Toit *et al Labour Relations Law* 6th ed (2014) 140.

⁷¹ *Idem* at 147.

⁷² S 185(1) and (2).

⁷³ CCMA Annual report 2013/14 at 45.

⁷⁴ *Supra* note 31 at 29.

⁷⁵ S 188.

⁷⁶ S 187.

⁷⁷ S 5.

⁷⁸ S 194.

⁷⁹ Brand *et al Labour Dispute Resolution* 2nd ed (2008) 37; see also ss 194 and 191(5)(b)(i).

⁸⁰ S 191.

must resolve the dispute within 30 days.⁸¹ In circumstances where the dispute was referred out of the prescribed time period, a party must, when referring the matter, also file an application for condonation.⁸² This application must state the degree of lateness, reasons for lateness, and prospects of success and prejudice that may or may not be suffered by the other party.⁸³ The CCMA will not have jurisdiction unless condonation is applied for and granted.⁸⁴

The main objective of conciliation is to assist the parties to settle or find a solution that is practical, cost effective and which will maximise satisfaction to both parties. This the commissioner can do after hearing both sides of the story and advising the parties on how best to settle.⁸⁵ The commissioner has no power to force the parties to settle and no matter how reasonable the proposal may be, s/he must complete a certificate of non-resolution and advise the parties on the next step.⁸⁶

“Rule 25⁸⁷

Rule 25 provides as follows:

Representation before the commission.—(1) (a) In conciliation proceedings a party to the dispute may appear in person or be represented only by—

- (1) a director or employee of that party and if a close corporation also a member thereof;
or*
- (2) any member, office bearer or official of that party’s registered trade union or registered employers’ organisation.*
- (b) In any arbitration proceedings, a party to the dispute may appear in person or be represented only by:*
 - (1) a legal practitioner;*
 - (2) a director or employee of that party and if a close corporation also a member thereof;
or*
 - (3) any member, office-bearer or official of that party’s registered trade union or a registered employers’ organisation.*

⁸¹ S 135.

⁸² S 191(2).

⁸³ *Supra* note 65 at 104.

⁸⁴ *Ibid.*

⁸⁵ *Supra* note 79 at 129.

⁸⁶ S 135.

⁸⁷ Rules for the conduct of proceedings before the CCMA, GN R 1448 in GG 25515 of 2003-10-10.

- (c) *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 sub-rule 1 (b), are not entitled to be represented by a legal practitioner in the proceedings unless—*
- (1) *the commissioner and all the other parties consent;*
 - (2) *the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering—*
 - (a) *the nature of the questions of law raised by the dispute;*
 - (b) *the complexity of the dispute;*
 - (c) *the public interest; and*
 - (d) *the comparative ability of the opposing parties or their representatives to deal with the dispute.*
- (2) *If the party to the dispute objects to the representation of another party to the dispute or the Commissioner suspects that the representative of a party does not qualify in terms of this rule, the commissioner must determine the issue.*
- (3) *The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of this Rule.*
- (4) *A representative must tender any documents requested by the commissioner in terms of sub-rule (3), including constitutions, payslips, contracts of employment, documents and forms, recognition agreements and proof of membership of a trade union or employers' organisation.”*

No legal representation is allowed in conciliation proceedings.⁸⁸ The Labour Court has held that even if parties agree to legal representation, the Commissioner has no discretion, s/he must refuse legal representation.⁸⁹

The CCMA has a duty to appoint a commissioner to arbitrate if any of the parties request the arbitration process.⁹⁰ The request for arbitration must be made within 90 day after receiving a certificate of non-resolution, failure which the party must apply for condonation.⁹¹ Arbitration is similar to litigation, although less formal.⁹² The Commissioner is given discretion to conduct

⁸⁸ Rule 25(1) of the CCMA rules.

⁸⁹ *Mavundla v Vulpine Investments* 2000 9 BLLR 1234.

⁹⁰ S 136.

⁹¹ *Supra* note 79 at 152.

⁹² *Supra* note 65 at 117.

the arbitration proceedings in a manner that s/he considers appropriate.⁹³ Whatever procedure the commissioner intends to use, s/he must be able to determine the dispute fairly and quickly, deal with substance of the matter and use less legal principles.⁹⁴ Parties may give evidence, call and question witnesses and make closing arguments.⁹⁵

As already seen from the rule above, in arbitration proceedings, legal representation is permitted except where the dispute concerns fairness of dismissal for misconduct or incapacity.⁹⁶ In such cases, legal representation can only be allowed where both parties consent to it or the commissioner is of the view that the matter is complex.⁹⁷

The provisions of Rule 25(3)(c) have already withstood a constitutional attack brought by the Law Society of the Northern Province acting on behalf of its members. The Society launched the attack on the basis that the rule infringed on their constitutional right to choose their trade, occupation and profession freely,⁹⁸ and further, that it infringed on the right of a person to have any dispute, which could be resolved through application of law, resolved in a fair public hearing before a court or another independent and impartial tribunal.⁹⁹

The court *a quo*¹⁰⁰ ruled in favour of the Law Society and found that the impugned rule was inconsistent with section 3(3) of the Promotion of Administration Justice Act.¹⁰¹ The court relied on the principle of legality. It found that the rule was not rational, taking into account that legal representation was allowed in other disputes but for misconduct and incapacity disputes.

On appeal at the Supreme Court of Appeal (SCA),¹⁰² the decision of the high court was overturned. In finding that the rule was constitutional, the SCA took cognisance of the historical context of the rule. In this regard, it went further to extract the following from the explanatory memorandum:

⁹³ S 38.

⁹⁴ S 138(1).

⁹⁵ S 138(2).

⁹⁶ Rule 25(3)(c).

⁹⁷ *Ibid.*

⁹⁸ S 22 of the Constitution, 1996.

⁹⁹ S 34 of the Constitution, 1996.

¹⁰⁰ *Supra* note 50.

¹⁰¹ Act 3 of 2000.

¹⁰² *Supra* note 49.

“Legal representation is not permitted during arbitration 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 businesses at a disadvantage because of the cost.”¹⁰³

The SCA found in favour of the CCMA. Unsatisfied with the SCA judgment, the Law Society applied for leave to appeal to the Constitutional Court (CC). The CC dismissed the Application with costs. Below is the statement from the CCMA after the CC made its decision:

Article Date: 12 November 2013

The Constitutional Court of South Africa dismissed the Law Society of Northern Province’s application for leave to appeal with costs in an order dated 08 2013.

In response to this decision, CCMA Director Nerine Kahn said: “The Constitutional Court has in their decision upheld a central tenant of the Labour Relations Act (LRA) which is to ensure that all citizens have access to affordable justice in terms of dispute resolution as provided for by the Commission for Conciliation, Mediation and Arbitration (CCMA).”

This case arises from the Supreme Court of Appeal having handed down a judgment on the 20 September 2013 that held that the CCMA’s rules around the right to legal representation in arbitration proceedings relating to unfair dismissals was not unconstitutional and invalid.

The involvement of legal practitioners in CCMA processes has been the subject of ongoing debate for many years, with the CCMA seeking to ensure that their involvement is kept to a minimum – primarily to ensure that costs are curtailed and are not a barrier to universal and equitable access.

The Supreme Court of Appeal’s decision overturned a judgment by the North Gauteng High Court which found in favour of the Law Society of Northern Province. The Supreme Court of Appeal’s upheld the CCMA’s Rules and provisions which stipulate that the right to legal representation in arbitration proceedings is at the discretion of the Commissioner.

In response to the decision by the Supreme Court of Appeal the CCMA Director Nerine Kahn had said: “This is a historic judgment and reconfirms the spirit in which the LRA was drafted. This clause is at the heart of redressing our past and establishing the new labour dispensation. Dismissal disputes comprise

¹⁰³ Para 13 of the judgment.

of more than 80% of all matters, and this clause underpins the objective of providing an accessible, equitable, speedy and cheap access to redress unfair dismissals.”¹⁰⁴

Issued by the CCMA

As part of an attempt to fast track these disputes, the LRA¹⁰⁵ states that on completion of the arbitration hearing, the commissioner must issue an arbitration award with brief reasons, signed by that commissioner, within 14 days.¹⁰⁶ According to the LRA, the time period for issuing of awards is not peremptory but directory.¹⁰⁷

In an effort to fast track enforcement of the award, the amendments to the LRA were effected and came into effect on 1 January 2015.¹⁰⁸ Before the amendments, in order to enforce the award, a successful party in the arbitration proceedings had to have the award certified by the Director of the CCMA that the award was an award contemplated in terms of section 143(1).

Kate Savage summarises the enforcement of the process under the 1996 Act as follows:

“To enforce an arbitration award in terms of the current process envisaged by section 143, [the] successful applicant at arbitration must therefore, demand compliance from the employer on the date on which the relief is awarded; if

- no compliance is forthcoming, take the award to the CCMA in order to have it certified;*
- once certified, attend at the Labour Court to have a writ of execution issued in respect of a monetary award or institute contempt proceedings at the Labour Court in respect of an award of specific performance, such as for reinstatement;*
- take the writ of execution to the Sheriff’s offices and instruct that the writ be acted upon by the Sheriff (usually requiring payment of money to the Sheriff as a precursor) or prosecute the contempt proceedings before the Labour Court.”¹⁰⁹*

The amendment to section 143(3) reads

“(a)n award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless

¹⁰⁴ Issued by the CCMA, Victory for cheap, universal and equitable access to justice-concourt rules against an application by Law Society of Northern Province for leave to appeal, Johannesburg, 2013-11-12 <http://www.ccma.org.za/> (accessed 2015-04-12).

¹⁰⁵ S 138(7).

¹⁰⁶ Grogan *Labour litigation and dispute resolution* (2010) 155.

¹⁰⁷ S 138(8).

¹⁰⁸ Labour Relations Amendment Act 6 of 2014.

¹⁰⁹ Savage “The enforcement of arbitration awards: do the amendments to section 143 go far enough?” 2012-10-18 <http://www.saslaw.org.za/index.php/2012-conf/2012-papers> (accessed 2015-04-18).

it is an advisory award.”

The consequence of the amendment is that an award that has been certified by the CCMA can be presented to the deputy Sheriff for execution if payment is not made. This removes the need to approach the Labour Court to issue a writ of execution. Also, in respect of awards ordering reinstatement, which are enforced by contempt proceedings at Labour Court, one need not apply for the award to be made an order of court before s/he can commence with contempt proceedings. Furthermore, the enforcement of awards to pay money will happen in accordance with the rules and tariffs of the Magistrates' Courts.¹¹⁰

It is not disputed that the CCMA plays a central role in the labour disputes resolutions system. However, it is also clear that it is not as efficient as was expected. The underestimation of the cases to be referred to the CCMA was the first predicament. The early projections were that the CCMA would deal with around 30 000 cases per year, but this was not the case in the first year (1996/1997) where only 2917 cases were referred. The number increased dramatically to 67 319 in 1997/1998 period.¹¹¹ In 2005/2006, the number had gone to just under 130 000,¹¹² and around the end of March 2011, the CCMA had received 154 279 referrals for 2010/2011.¹¹³ At year-end 2014, the referrals were just under 200 000 for that year.¹¹⁴ This massive response to the system created a strain on the system.¹¹⁵

Some of the factors that were aimed at achieving the objectives of the LRA are actually the reason for some of its failures. Moreover, the fact that there are no costs involved in referring a dispute to the CCMA attracts frivolous claims.¹¹⁶

Most parties, especially employers object to the con-arb process¹¹⁷ which entitles parties to commence with arbitration after failing to settle the dispute on the same day. Judge Pillay captures the reason for this failure:

“An attempt was made by introducing the con-arb in the 2002 amendment to the LRA to make the two stage process seamless. As it is used infrequently, it has not succeeded in improving the

¹¹⁰ *Idem* at 4.

¹¹¹ *Supra* note 54 at 12.

¹¹² *Ibid.*

¹¹³ Levy and Venter “The Dispute Resolution Digest 2012 Tokiso Dispute Settlement” 2012 23.

¹¹⁴ Levy and Venter “The Dispute Resolution Digest 2014 Tokiso Dispute Settlement” 2014 28.

¹¹⁵ *Supra* note 32 at 86.

¹¹⁶ *Ibid.*

¹¹⁷ S 191(5A).

efficiency of dispute resolution.”¹¹⁸

Another factor affecting the efficiency of the system is failure by the parties to attend conciliations, especially employers. There are no costs or sanction that might follow the non-attendance.¹¹⁹ Gauteng has been singled out as one of the provinces with high statistics of non-attendance for conciliation; this is mainly as a result of parties wanting to go straight to arbitration or notices not being sent out due to case load.¹²⁰ Other factors in this regard include lack of training, where trade union and employer representatives refuse to settle and turn conciliation into power play and posturing to impress.¹²¹

The other criticism against the system is that the intended guidelines in schedule 8 are now used as a yardstick;¹²² this has in turn translated the guidelines into being a codified set of rights and obligations. This accordingly has resulted in the system being too technical, thus requiring the use of lawyers.¹²³ One must always be mindful of the fact that the CCMA was meant to resolve disputes in a manner that seeks to avoid technicalities and delays, which are a dominant feature in the litigation process.¹²⁴

It would seem that failure to totally exclude labour lawyers from the CCMA has also contributed in an inefficient dispute resolution system. Lawyers are criticised for turning the process into a court; they raise points *in limine*, which have an effect of causing postponements. In addition, they become legalistic and their diaries are full, thus causing delay in finalisation of the matters.¹²⁵

2.3.2 High Court and Labour Courts

The creation of the Labour Courts, taking into account its equal status to the already existing High Courts was not a seamless transition.¹²⁶ The unforeseen event was that litigants were confused as to which Court to go to between the Labour Court and the High Court.¹²⁷

¹¹⁸ *Shoprite Checkers (Pty) Ltd v CCMA* 2005 26 ILJ 1119 (LC) at para 24.

¹¹⁹ *Supra* note 109.

¹²⁰ *Supra* note 32 at 97.

¹²¹ *Idem* at 98.

¹²² The guidelines were aimed at guiding parties on misconduct cases.

¹²³ *Supra* note 32 at 81.

¹²⁴ *Supra* note 36 at 26.

¹²⁵ *Supra* note 54 at 48.

¹²⁶ S 151 of the LRA, see also discussion on page 7 above.

¹²⁷ *Fedlife Assurance Ltd v Wolfaardt* 2001 (22) ILJ 2407 (SCA), *Fredericks & Others v MEC for Education and Training, Eastern Cape* (2002) (23) ILJ 81 (CC).

For the purpose of this paper, one will focus on the *Chirwa* matter, which is in line with the discussion as it deals with dismissal of an employee.¹²⁸

In this matter, a senior employee, was dismissed following a disciplinary hearing for incompetence and poor work performance. She accordingly, referred a dispute to CCMA as set out above for conciliation. The matter could not be settled. Instead of referring the matter to arbitration as per the labour relations mechanism, she launched an application at the High Court on the basis that her dismissal was unfair as it violated her right to just administrative action as given effect by Promotion of Administrative Right (PAJA).

The High Court agreed with the employee and the matter went to the Supreme Court Appeal and subsequently the Constitutional Court. It is important to state that this claim is sourced from the proposition that the employer is an organ of state, and that the dismissal of the employee amounts to an exercise of power, which is reviewable under section 3 and 6 of PAJA.

The Constitutional Court, firstly stated the employee relied on provisions of the LRA in formulating her claim thus should have gone the LRA route. Further that, should an employee be given a choice to either go to high Court instead of following the labour relations mechanism will lead to a dual system which will defeat the purpose of the LRA. The Court further held dismissal was in any event not an administrative action in terms of PAJA.¹²⁹

The Court held that the primary purpose of section 157(2) was not to confer jurisdiction on the High Court to deal with labour and employment relations disputes, but rather to empower the Labour Court to deal with disputes founded on the provisions of the Bill of Rights that arise from employment and labour relations. In order to reconcile the relevant provisions of the LRA and the primary objects of the LRA the provisions of section 157(2) must be confined to those instances where a party relies directly on the provisions of the Bill of Rights. In the present case he found that employee relied upon a breach of the provisions of the LRA and that therefore the Labour Court had exclusive jurisdiction.¹³⁰

¹²⁸ *Chirwa v Transnet and Others* (2008) 28 ILJ 73 (CC).

¹²⁹ *Supra* Note at paragraph 40.

¹³⁰ *Supra* note at paragraph 87.

The arbitration award does not normally become the end of the dispute. The LRA also created a review process whereby a displeased party can approach the Labour Court to review the award.¹³¹ Just like the CCMA, the labour courts are enacted in terms of the LRA.¹³²

The Labour Court is made up of a judge president, a deputy judge president and judges. They are appointed from a pool of legal practitioners and also from High Courts.¹³³ Only one judge sits in a labour court.¹³⁴

In principle, launching review proceedings do not stop the implementation of the award. However, trying to enforce the award subjected to a review may be a waste of time as the labour court may stay the enforcement if the other party brings an application to stay the execution of the award, if such an application is made.¹³⁵

The labour court has exclusive jurisdiction to review arbitration awards issued under the auspices of the CCMA or bargaining council; no other court can review the awards.¹³⁶ For the purpose of this paper, it is probably best to succinctly explain the concept of a review.

Review is one of the processes used to reconsider a decision, the other method being the appeal process. An appeal process is used when one is of the view that the decision maker arrived at a wrong conclusion on the facts or law, whereas the review process is used where one attacks the process/manner, which the decision maker used to reach the conclusion.¹³⁷ Instead of asking whether the decision is right or wrong as is the case on appeal, the review concerns itself with issues such as impartiality and the evidence taken into account.¹³⁸ In cases where the court finds that the same decision would have been arrived at despite the manner in which the hearing was held, the court may still set aside that decision.¹³⁹

Awards of the CCMA are reviewed in terms of section 145 of the LRA. In terms of this section, the award may be set aside if there is a defect in the arbitration proceedings in that the commissioner:

¹³¹ S 145.

¹³² Ss 151 and 167.

¹³³ *Supra* note 68 at 433.

¹³⁴ S 152(2).

¹³⁵ *Supra* note 106 at 161.

¹³⁶ *Idem* at 277.

¹³⁷ Hoexter, *Administrative Law in South Africa* 2nd ed (2012) 108.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

- (i) Committed misconduct in relation to his/her duties;
- (ii) Committed gross irregularity in the conduct of the arbitration proceedings or;
- (iii) Exceeded his or her powers.¹⁴⁰

There is authoritative case law from the Constitutional Court outlining how the Labour Court must approach reviews.¹⁴¹ The test to be used when determining whether the award is reviewable or not is as follows:

“Is the decision made by the arbitrator one that a reasonable decision maker could not reach on the available material?”¹⁴²

There has been argument by some who state that the *Sidumo* test deals only with the result or the outcome of the arbitration proceedings, that it is still possible to review an award on process related grounds.¹⁴³ The argument is simply that the *Sidumo* test requires one to evaluate whether on the face of the evidence presented to the arbitrator, that the decision made was reasonable. If it was, the new argument goes further to state that the award is still reviewable if the arbitrator committed a defect in terms of the process he followed; this is the so-called process related grounds, for example, he allowed inadmissible evidence.¹⁴⁴

This approach was rejected by the Supreme Court of Appeal (SCA).¹⁴⁵ However, a differently constituted LAC agreed with the approach of the SCA and summarised the test for review as follows:

“(14) ...The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator

¹⁴⁰ S 145(2).

¹⁴¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

¹⁴² *Idem* at para 110, known as *Sidumo* test.

¹⁴³ *Herholdt v Nedbank Ltd* 2012 9 BLLR 857 (LAC).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Herholdt v Nedbank LTD* (701/2012) 2013 ZASCA 97.

misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.

[15] *A ‘process-related review’ suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into accounts facts that are irrelevant, and the like. The emphasis here is on process, and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.*

[16] *In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.’¹⁴⁶*

As stated earlier, section 145 regulates the process of review proceedings; the LRA prescribes that the review of arbitration awards must be launched within 6 weeks of the award being served on the parties.¹⁴⁷ Late application may be condoned on good cause shown.¹⁴⁸ The six weeks’ period is from the calendar date on which the award was received to the end of the day preceding that same day in the final week.¹⁴⁹ Good cause shown has been defined by factors

¹⁴⁶ *Goldfields Mining South Africa (PTY) Ltd v CCMA* 2014 35 ILJ 943 (LAC).

¹⁴⁷ S 145(1)(a).

¹⁴⁸ S 145(1A).

¹⁴⁹ *Supra* note 94 at 281.

developed in the case of *Melanie v Santam Insurance Company Limited*,¹⁵⁰ where the court stated:

*“...that the facts that the court usually takes into account in a judicial exercise of its discretion are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Condonation will not be granted if the Applicant has shown wilful or reckless disregard of the requirements of the rules of court or of a statute. Where an Applicant either does not explain default or does so unsatisfactorily, condonation will not be granted. These courts have gone so far as to say that in such circumstances, there is not even a need to examine prospects of success.”*¹⁵¹

In principle, due to the fact that these disputes must be resolved expeditiously, condonation application will not be granted lightly.¹⁵²

The procedure for the review procedure is regulated by the rules of the labour court as follows:¹⁵³

Rule 7A – Reviews

Sub-Rule 1

A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.

Sub-Rule 2

The notice of motion must–

(a) call upon the person or body to show why the decision or proceedings should not be reviewed and corrected or set aside;

(b) call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done; and

(c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.

Sub-Rule 3

¹⁵⁰ 1962 (4) SA 531 (A).

¹⁵¹ At 532C-F.

¹⁵² *Royal Autospares CC v Numsa* 2001 10 BLLR 1164 (LC).

¹⁵³ GN 1100 of 1998-09-04, Rule 7A.

The person or body upon whom a notice of motion in terms of sub-rule (2) is served must timeously comply with the direction in the notice of motion.

Sub-Rule 4

If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction.

Sub-Rule 5

The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct.

Sub-Rule 6

The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.

Sub-Rule 7

The costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then become costs in the cause.

Sub-Rule 8

The applicant must within 10 days after the registrar has made the record available either—
(a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or
(b) deliver a notice that the applicant stands by its notice of motion.

Sub-Rule 9

Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant.

Sub-Rule 10

Applicant may file a replying affidavit within 5 days after receipt of an answering affidavit

The struggle to implement the awards in most cases start during this process, hence Benjamin's sub-title, *The Long and Winding Road: Resisting and Enforcing Arbitration Awards*.¹⁵⁴

Implementation of Rule 7A (2)(b) has been a nightmare in most cases. In order to be able to review the award, the court will need complete transcripts and copies of documents introduced

¹⁵⁴ *Supra* note 31 at 40.

at the arbitration hearing.¹⁵⁵ In most cases, the CCMA is unable to comply with this request to produce records due to them either being lost or poorly recorded.¹⁵⁶

In these circumstances, the applicant is burdened with the responsibility to try and reconstruct the record with the assistance of the arbitrator and the other party; failure to take this initiative may result in the application being dismissed.¹⁵⁷ The process of constructing a record was simply explained by the labour court as follows:

“A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to accuracy or completeness.”¹⁵⁸

In the circumstance where the record cannot be constructed, the award will be set aside and the matter will be remitted for a hearing.¹⁵⁹ Before the new amendments,¹⁶⁰ the LRA and the rules of the labour court did not prescribe a time limit for the applicants to file the record.¹⁶¹ This also had a negative impact on resolving the disputes expeditiously.

Another cause for delays in implementing the awards is the period taken by judges to hand down judgments after having heard the matter. Some of the evidence presented is as follows:

¹⁵⁵ *Supra* note 106 at 306.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Fidelity Cash Management Services (Pty) Ltd v Muvhango* 2005 26 ILJ 876 (LC).

¹⁵⁸ *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA* 2003 24 ILJ 931 (LAC) at para 17.

¹⁵⁹ *Metalogik Engineering & Manufacturing CC v Fernandez* 2002 23 ILJ 1592 (LC).

¹⁶⁰ 2014 LRA amendments.

¹⁶¹ *Supra* note 94 at 307.

“In April 2012, SASLAW undertook a survey amongst members on judgments reserved for more than 6 months by the Labour Court (LC) and Labour Appeal Court (LAC), with the closing date for returns having been 19 April 2012.

The project was overseen by Anton Myburgh SC (SASLAW National President) and Richard Maddern (SASLAW National Committee Member).

In summary, the survey revealed that as of 19 April 2012:

- 1.1 there were 39 judgments outstanding for more than 6 months – 27 by the LC and 12 by the LAC;*
- 1.2 of these 39 judgments, 20 were outstanding for more than a year – 11 by the LC and 9 by the LAC;*
- 1.3 the majority of the judgments outstanding for more than 6 months by the LC were due by one specific judge;*
- 1.4 the majority of the judgments outstanding for more than 6 months by the LAC were due by acting judges of the LAC; and*
- 1.5 more than half of the permanent judges of the LC had no judgments outstanding for more than 6 months.”*

In his remarks, Benjamin concludes that it takes about 23 months from the date of the arbitration award for the LC to hear a review application and more months to have a judgment given.¹⁶²

As if the road to enforcement is not enough, the LRA also allows for the decisions of the Labour Court to be appealed to the Labour Appeal Court (LAC). The appeals process further defeats the intention of speedy resolutions to labour disputes.

¹⁶² Supra 31 at 40.

The Labour Appeal Court, just like the Labour Court, is established in terms of the LRA.¹⁶³ Accordingly, the intention was to have the LAC as the final court of appeal in respect of matters within its exclusive jurisdiction.¹⁶⁴

I will deal further with the issue of jurisdiction of the LAC and Supreme Court of Appeal (SCA) in the next section titled “The Constitution”. It suffices to state that for a long time, the appeals process was cumbersome to the goal of achieving speedy resolution to the disputes.

The Labour Court seats three judges at any given time and is made up of the judge president, who also becomes the judge president of the Labour Court,¹⁶⁵ the deputy judge president who also becomes the deputy judge president of the Labour Court,¹⁶⁶ and a number of other judges needed for functionality of the court.¹⁶⁷

LRA Amendments

In view of some of the concerns already highlighted above, the Minister of Labour tabled the Labour Relations Amendment Bill in 2012,¹⁶⁸ to among other things, deal with the inefficiency of the labour dispute resolution system. This is clear where the memorandum states:

“The proposed amendments to the Acts can be grouped under the following themes–

(d) enhancing the effectiveness of the primary labour market institutions such as the Labour Court, the CCMA, the Essential Service Committee and the Labour Inspectorate.”

After long discussions and the bill going back and forth in Parliament, the bill was subsequently signed into the Act on 15 August 2014.¹⁶⁹ Only on 19 December 2014, a proclamation was signed by the President of the Republic of South Africa stating that the LRA amendment would commence on 1 January 2015.¹⁷⁰

¹⁶³ S 167.

¹⁶⁴ S 167(2).

¹⁶⁵ S 168(1)(a).

¹⁶⁶ S 168(1)(b).

¹⁶⁷ S 168(1)(c).

¹⁶⁸ Memorandum of Objects, Labour Relations Amendment Bill, 2012.

¹⁶⁹ Act 6 of 2014.

¹⁷⁰ GG 38317.

Amendments critical to this paper are section 143, dealing with enforcement and section 145.¹⁷¹ Section 145 amendments were accordingly meant to enhance or speed up the review process. The addition to section 145 reads as follows:

“Amendment of section 145 of Act 66 of 1995, as amended by section 34 of Act 12 of 2002 and section 36 of Act 12 of 2004

22. *Section 145 of the principal Act is hereby amended by the addition of the following subsections:*
- (5) *Subject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application, and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.*
 - (6) *Judgment in an application brought under subsection (1) must be handed down as soon as reasonably possible.*
 - (7) *The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).*
 - (8) *Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must—*
 - (a) *In the case of an order of reinstatement or re-employment, be equivalent to 24 months’ remuneration; or*
 - (b) *In the case of an order of compensation, be equivalent to the amount of compensation awarded.*
 - (9) *An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), in respect of that award.*
 - (10) *Subsections (5) to (8) apply to an application brought after the date of commencement of the Labour Relations Amendment Act, 2014 and subsection (9) applies to an arbitration award issued after such commencement date.”*

¹⁷¹ Section 143 amendments already dealt with, see 18 above.

It will seem that the intention of the amendments is to try and tighten screws on litigants who abuse the review process to avoid implementation of awards. It is well documented that the labour court has many dormant files, which applicants are not pursuing. This clearly shows that the intention was to frustrate the enforcement of the award.¹⁷²

Judge Froneman had this to say about the delays at the Labour Courts:

*“The delays in the system are caused by any one or more of these actors. Systematic delay is not impersonal, inevitable and [an] independent force, it is simply a delay caused by the inaction of people within the dispute resolution process”*¹⁷³

The amendments do respond to the challenges of the dispute resolution system, in that within six months, pleadings must be close and the Applicant must have requested a date. The delay of judgments has also been an issue. However, it is not clear what will happen to judges who do not comply with Norms and Standards for the Performance of Judicial Function.¹⁷⁴ The furnishing of security is a key development in that litigants will be committed to conclude the review process and that it will deter parties from reviewing for the sake of it.

Whilst writing this paper, the amendment commenced thus, one will not be able, at least for now, to analyse the impact the amendment will have on the dispute resolution system, save to say they it is a step in a right direction to some extent.

2.3 The Constitution

Section 2 of the Constitution reads:¹⁷⁵

“Supremacy of Constitution

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

¹⁷² Judge A Van Niekerk, “Speedy Justice: Streamlining Labour Processes”, 2011-10-15, <http://www.saslaw.org.za/index.php/2011-conf/2011-papers> (accessed 2015-04-21).

¹⁷³ *Billiton Aluminium SA t/a Hillside Aluminium v Khanyile* 2010 31 ILJ 237 (CC).

¹⁷⁴ GG 37390.

¹⁷⁵ 1996.

It is for this reason that South Africa is known as a constitutional democracy. The Constitution is the supreme law of the country thus any act or law contrary to it or its spirit is unlawful.

Section 23 states that everyone has a right to fair labour practice. This right is found in chapter 2 of the Constitution, which is known as the Bill of Rights. The rights in the Bill of Rights bind all spheres of government, namely, executive, judiciary and parliament.¹⁷⁶

Section 23 of the Constitution states that everyone has a right to fair labour practices. The Constitutional Court has defined “everyone” as follows:

“Where the rights in the section are guaranteed to workers or employers or trade union or employers['] organizations as the case may be, the Constitution says so explicitly. If the rights in s 23(1) were to be guaranteed to workers only, the Constitution should have said so. The basic flaw of the applicant’s submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must apply either to all employers or none. It should make no difference whether they are natural or juristic.”

Accordingly, it is clear that labour practices must apply fairly to everyone in some sort of employment relationship. Actually, this goes beyond the normal contracts of employment and extends to the so called unlawful contracts of employment.¹⁷⁷

For the purposes of this paper, 4 sections play a critical role in the dispute resolution system, namely, sections 39, 233, 167 and 168. The first two have to do with recognising international law and the last two deal with hierarchy of courts. I will deal with the hierarchy of courts and defer the international law part to the section below, titled the “International Labour Organization”.¹⁷⁸

Section 183 of the LRA states that subject to the Constitution and despite any other law, no appeal lies against any decision, judgment or order given by the Labour Appeal Court in respect of an appeal in terms of section 173(1)(a), its decision on any question of law in terms section 173(1)(b) and any judgment or order in terms of section 175. According to Du Toit, this law will be valid in terms of the Interim Constitution.¹⁷⁹

¹⁷⁶ S 8(1) and (2).

¹⁷⁷ *Kylie v CCMA* 2010 4 SA 383 (LAC).

¹⁷⁸ See page 33 below.

¹⁷⁹ *Supra* note 65 at 175.

The new Constitution¹⁸⁰ changed everything when it came into operation, the relevant sections read:

“167(3) The Constitutional Court is the highest court in all Constitutional matters,

168(3) The Supreme Court of Appeal is the highest court of Appeal except in Constitutional matters.”

As already indicated earlier, the Constitution is the supreme law of the country, thus no law can surpass it. This created confusion as it meant section 183 of the LRA could not stop the SCA from hearing appeals from the SCA.

Indeed the issue came to court in the matter of *National Union of Metalworkers of South Africa v Fry’s Metals (Pty) Ltd.*¹⁸¹ The SCA had to consider whether it had any appellate jurisdiction in respect of appeals from the Labour Appeal Court, in light of section 183 of the LRA read with section 168(3) of the Constitution prior to its amendment. The SCA held that the starting point was that the LRA’s provisions conferring finality on the Labour Appeal Court had to be read in conjunction with the appellate powers created by the Constitution. It was held that the Constitution in section 168(3) vested the SCA with the power to hear appeals from the Labour Appeal Court in both Constitutional and non-constitutional matters, and the provisions of the LRA, which conferred final appellate power on the Labour Appeal Court, must be read subject to the appellate hierarchy created by the Constitution itself. This, the SCA held, did not entail that any provisions of the LRA were unconstitutional as the LRA had to be interpreted subject to the Constitution. As a result, the SCA held that it had jurisdiction to hear the matter.

This ultimately meant that for the longest of times, the objective of having speedy resolution to labour matters was a dream, in that from the Labour Court, the matter had to go the LAC, then SCA and finally the Constitutional Court. As Du Toit put it:

*“The result, clearly not intended when the LRA was drafted, is that an appeal lies from the Labour Appeal Court to the Supreme Court of Appeal.”*¹⁸²

It took more or less 15 years for the legislature to try and rectify this anomaly. The Seventeenth Amendment Bill was adopted by Parliament on 20 November 2013 and came into effect on 22 August 2013.¹⁸³

¹⁸⁰ 1996.

¹⁸¹ 2005 (5) SA 433 (SCA), see also *Nehawu v University of Cape Town* 2003 (2) BCLR 154 (CC).

¹⁸² *Supra* note 65 at 175.

¹⁸³ The Constitution Seventeenth Amendment Act, 2012.

Section 167(3) now reads as follows:

“Amendment of section 167 of Constitution, as amended by section 11 of the Constitution Sixth Amendment Act of 2001

3. Section 167 of the Constitution is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

“(3) The Constitutional Court—

(a) is the highest court [in all constitutional matters] of the Republic; and

(b) may decide [only]—

(i) constitutional matters[, and issues connected with decisions on constitutional matters]; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is [a constitutional matter or whether an issue is connected with a decision on a constitutional matter] within its jurisdiction.”; and

(b) by the substitution for subsection (5) of the following subsection:

“(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, [a] the High Court of South Africa, or a court of similar status, before that order has any force.”

The effect of this amendment is that the Constitutional Court ceased to be the highest court on constitutional matters only, but is now the highest court in relation to important points of law and other issues connected with decisions on constitutional matters.¹⁸⁴ The effect of this on labour dispute resolution is that the Labour Appeal Court does not become the final court of appeal. Litigants who claim that the matter raises an important point of law can appeal at the Constitutional Court. In addition, litigants are no longer limited to constitutional issues only appeal at the Constitutional Court.¹⁸⁵

“Amendment of section 168 of Constitution, as amended by section 12 of the Constitution Sixth Amendment Act of 2001

4. Section 168 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.

¹⁸⁴ *Supra* note 70 at 181.

¹⁸⁵ *Ibid.*

(b) The Supreme Court of Appeal may decide only—

(i) appeals;

(ii) issues connected with appeals; and

(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.”¹⁸⁶

The amendment above is meant to give effect to section 183 of the LRA, that is, to make the LAC the final court of appeal in relation to matters under its jurisdiction. This is meant to curb an appeal process to the SCA. It will now seem that after a long period, the SCA’s jurisdiction in this regards has been ousted.

To confirm this, in *National Union of Public Service and Allied Workers obo Mani v National Lotteries Board*, the court held that “[a]s a result of the Constitution Seventeenth Amendment Act of 2012, this right of appeal to the Supreme Court of Appeal no longer exists”. The court went on to say that section 168(3)(a) of the Constitution now reads: “The Supreme Court of Appeal may decide appeals in any matters arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.”¹⁸⁶

2.4 International Labour Organization

The founding document of the 1996 LRA reads:

“The proposed amendments to the Acts can be grouped under the following themes:

- (a) Responses to the increased information of labour to ensure that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work;*
- (b) Adjustment to the law to ensure compliance with South Africa’s obligation in terms of international labour standards.”¹⁸⁷*

South Africa, as one of the signatories of the treaty of Versailles, is one of the founding members of the International Labour Organization (ILO). She continued to be a member until 1961 where a resolution was passed to withdraw her membership due to the apartheid policy

¹⁸⁶ 2014 (3) SA 544 (CC), see fn 26 of the judgment.

¹⁸⁷ *Supra* note 164.

she was implementing.¹⁸⁸ As a result of the democratic dispensation, South Africa has since re-joined the ILO,¹⁸⁹ and has since ratified all the key conventions of the ILO.¹⁹⁰

The ILO states that its mission is to establish fair competition between countries through the establishment of standard setting protective values and to establish social peace through equal working conditions.¹⁹¹

In the light of these developments, it is not surprising that the International Committee expects South Africa to adhere to the standards set by the ILO when dealing with unfair dismissal disputes. These expectations are not incorrect in the light of the obligations that South Africa has set for herself.

Earlier on, I had alluded to the sections in the Constitution that create this expectation, namely section 39 and 233.

Section 39 reads:

“(1)When interpreting the Bill of Rights, a court, tribunal or forum–

- (a) Must promote the values that underlie an open democratic society based on human dignity, equality and freedom;*
- (b) Must consider international law; and*
- (c) May consider foreign law.*

Section 233 reads:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any international law that is inconsistent with international law.”

Section 1 of the LRA also states that one of its purposes is to give effect to obligations incurred by South Africa as a member state of the ILO. From reading the above sections, it is clear that the Constitution demands that international law be considered and that this may prove to be

¹⁸⁸ *Supra* note 63.

¹⁸⁹ 1994-05-26.

¹⁹⁰ *Supra* note 63.

¹⁹¹ Preamble of the ILO Constitution.

vital at a stage where limitation of a right in terms of section 36 is considered.¹⁹² In *S v Makwenyane*, the Constitutional Court had this to say about international law:

*“International agreements and customary law provide a framework within which the Constitution can be evaluated and understood, and for that purpose decisions of tribunal[s] dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the International Labour Organization may provide guidance as to the correct interpretation of particular provisions.”*¹⁹³

In order to set international standards, the ILO uses tools like conventions for member countries to abide by. Conventions legally are considered to be international treaties which are to be ratified in order to be binding for the member countries.¹⁹⁴ These are not automatically binding on member states until a member ratifies.¹⁹⁵

The relevant convention for the purpose of this paper is Convention 185 (C185) adopted in 1982 at Geneva, this convention deals with termination of employment contracts.¹⁹⁶ South Africa has not ratified this convention. However, due to the obligations imposed by the Constitution and the LRA, South Africa has a duty to consider C185 legislation dealing with dismissal.

The relevant sections in the convention read as follows:¹⁹⁷

“Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

¹⁹² Currie and De Waal *The Bill of Rights handbook* 6th ed (2013) 1476.

¹⁹³ 1995 (3) SA 39, para 36-37.

¹⁹⁴ Hepple *Labour Laws and Global Trade* Oxford / Portland (2005) 63.

¹⁹⁵ Smit *et al* “International Perspective on South Africa’s dismissal law” University of Pretoria, research output 48.

¹⁹⁶ *Ibid.*

¹⁹⁷ Known as articles.

2. Where termination has been authorised by a competent authority, the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.”

Article 3 states that the term termination and termination of employment mean termination at the initiative of the employer. In South Africa, the word dismissal is preferred as opposed to termination.

Article 7 simply requires that the employer must give an employee a chance to state his side before a decision to dismiss is taken. In *Avril Elizabeth Home for the Handicapped v CCMA*,¹⁹⁸ the court held that “an opportunity to state a case” means no more than a dialogue or an opportunity for reflection before any decision is taken to dismiss. Accordingly, in South Africa, the procedural aspect of a hearing is requisite for a fair dismissal.¹⁹⁹ In this regard, it is clear that South Africa complies with Article 7.

¹⁹⁸ 2006 27 ILJ 1466 (LC).

¹⁹⁹ S 188 of the LRA and item 2(1) of Schedule 8.

It is important to note that the LRA and C158 do not create a right to appeal to a higher structure internally. However, an employer with a policy allowing for an internal appeal will be bound by such policy and failure to adhere to the policy may result in the dismissal being procedurally unfair.²⁰⁰

Article eight speaks to the right of an employee to refer the matter to an outside tribunal if s/he is not satisfied with the internal procedure, it also goes on to state that if the employee does not do this within a requisite time, then s/he will be deemed to have waived her/his right.

This concept envisaged by Article 8 is the same as one envisaged by the LRA. I have dealt extensively with the LRA, in particular the CCMA.²⁰¹ In this regard, referrals to the CCMA in terms of section 191 of the LRA are in line with Article 8. Furthermore, section 145 states that these referrals must be served within 30 days in the case of dismissals and 90 days in the case of unfair labour practice. Failure to refer the dispute to CCMA will be considered as waiving the right to appeal unless an application for condonation is made.

Article 9 requires the independent tribunal (in the case of South Africa, the CCMA), to investigate the reason for dismissal and also to come to its own conclusion about its findings. In essence, what Article 9 requires is that the CCMA must hear the matter *de novo*.²⁰²

In re Chiseno v Norkim Raiseboring,²⁰³ the court held:

“It is trite law that any arbitration conducted under the auspices of the CCMA is a hearing de novo and that being the case, one would expect the evidence to be more extensive and more deeply probed more so where the alleged unfair dismissal is in dispute and the onus is on the applicants to prove that there was dismissal as opposed to fixed-term contracts coming to an end.”

Accordingly, there is compliance with Article 9 as well. It is clear from the above that at least in terms of internal and independent appeals, South Africa is in compliance with the ILO. One only wonders if the review to labour courts and appeal to the LAC and further to the Constitutional Court will be in line with the ILO. The reason for this observation is that the ILO intended to have a less formalistic approach to these matters in order to save time and be effective.

²⁰⁰ *Supra* note 163.

²⁰¹ *Supra* note 190 at 66.

²⁰² *Ibid.*

²⁰³ JR 2515/11 Labour Court judgment at para 22.

Concluding Remarks

The LRA has gone through extensive amendment with the view of addressing short falls within the dispute resolution system. The amendments are a clear indication of the fact that the system had serious flaws, which rendered the attainment of effective dispute resolution a delusion.

In relation to the CCMA, the amendment only focused on the enforcement of awards, even though this is welcomed, in the light of the Law Society Judgment,²⁰⁴ one would have hoped that the Legislature will re-look the issue of legal representation at the CCMA. It is without a doubt that the use of lawyers has created a situation whereby arbitrations become too technical and legalistic. This, in my view, defeats the whole objective of having a non-technical, speedy and cheap process envisaged by the Ministerial Legal Task Team.²⁰⁵

Furthermore, as it is evident that the CCMA is strained when it comes to human resource as a result of escalating referrals, the state must also consider employing more people and increasing the number of CCMA offices in the country.

Moreover, in most cases, parties fail to attend conciliations and there are no consequences for such actions; one is tempted to suggest that stricter rules apply so as to ensure compliance in this regard.²⁰⁶

To a certain extent, the amendments are helpful in trying to expedite disputes and make the system more efficient, for example, the fact that pleadings must now be closed within twelve months, is a key development.²⁰⁷ However, the courts need to come up with a plan to reduce the backlog of cases from previous years. As Benjamin stated, it takes about 23 months to get a date at the Labour Court.²⁰⁸

Furthermore, either through rules or legislation, the commissioner who fails to record or keep records of the arbitration procedures must also be subjected to stricter measures that will ensure compliance with the rules.²⁰⁹ The same applies to judges who fail to deliver judgments within a reasonable time.

²⁰⁴ *Supra* note 49.

²⁰⁵ *Supra* 6 at 285.

²⁰⁶ See page 20 of this paper.

²⁰⁷ Practice Manual of the Labour Court of South Africa 2013.

²⁰⁸ See page 27 above of this paper.

²⁰⁹ See page 26 of this paper.

The exclusion of the SCA's jurisdiction to hear appeals of the LAC is welcome, *albeit* late. In line with the spirit of the LRA, the LAC must develop a plan of setting down matters as quickly as possible. The tendency of following or using rules similar to those of high courts does not assist a system that was meant to be speedy.

However, it is only fair to wait and see how the new amendments will improve the dispute resolution system.

CHAPTER 3

EVALUATION AND COMPARATIVE ANALYSIS OF THE LABOUR DISPUTE RESOLUTION SYSTEM OF SOUTH AFRICA AND THE UNITED KINGDOM

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3.1 Introduction

I have chosen the UK as a source of comparison because South African law has most of its origin from the English law due to colonisation that took place around the 18th century.²¹⁰ As a result of colonisation, English law was so dominant that the courts used English as a medium of communication; its influence in both private and public law is also evident. The law of evidence in both criminal and civil matters is largely from the English law.²¹¹ In essence, South Africa's legal framework is largely influenced by the UK.

It is, therefore, important to compare our dispute resolution system with a source that we have historical links with in order to conduct a proper analysis of verifying whether our dispute resolution system is on the right track. Needless to say, that the UK is also a developed country compared to South Africa.

3.1.1 Historical Background and Developments

It is important to note that prior to the 1970s, the UK believed in the collective *laissez-faire* principle, where employers and employees engaged in collective agreement to regulate their relationship.²¹² However, the situation changed in 1979 when Margaret Thatcher's Conservative government took over and a series of labour legislation were enacted during this period.²¹³ However, it must be noted that *laissez-faire* principle contributed immensely to dismissal law.

The Industrial Relations Act of 1971 was introduced; among one of the most important features of this legislation was the introduction of unfair dismissal.²¹⁴ This enactment was a result of government investigations in 1976.²¹⁵ As will also be seen in the South African context, the labour laws were subjected to several amendments. The amendments, just like in South Africa, were as a result of changes in political power and to a certain extent to balance the economy.

The Industrial Relations Act was repealed and consolidated into the Employment Protection Consolidation Act of 1987 and the Trade Union and Labour Relations Consolidation Act of 1992.²¹⁶ Currently, for the purposes of this paper, the relevant recent enactments by the UK are

²¹⁰ *Supra* note 190 at 54.

²¹¹ *Ibid.*

²¹² Kahn-Freund *Labour and the Law* (1983) 12 and further.

²¹³ Davies *Perspective on Labour Law* (2009) 4.

²¹⁴ Bennet "Montana's Employment Protection: A comparative Critique of Montana's Wrongful Discharge from the Employment Act in light of the United Kingdom's Unfair Dismissal Law" 118.

²¹⁵ *Idem* at 120.

²¹⁶ *Ibid.*

the Employment Rights Act of 1999 and the Employment Act of 2008. The former deals with collective bargaining and sections on how to conduct a disciplinary hearing, and regulates dispute settlement procedures. The latter expands on the dispute resolution procedure and disciplinary procedure.²¹⁷ Accordingly, it is the Employment Act that will be analysed in this regard.

Apartheid, resulting in South Africa's dark history, created a chaotic labour relations system. Due to international strain and the pressure from black workers' unions, the government initiated the Wiehahn Commission, which had to devise a plan to overhaul the labour relations arrangement.

In 1979, the Commission gave its report to the government. One of the reports' major recommendations was that the state had to restructure the industrial tribunal into an industrial court to adjudicate on dispute of rights, disputes of interest and create a body of case law.²¹⁸

In 1981, an amended Labour Relations Act came about. In 1979, as a result of the Commission a new court was established, namely the Industrial Court. This court was clothed with jurisdiction to determine dispute concerning "unfair labour practices" in the workplace²¹⁹. According to Grogan, the definition of unfair labour practice was so open-ended that it provided ample scope for the development, by that court, of a new set of principles relating to dismissal and other norms of labour practice.²²⁰ It is safe to conclude here that this was the beginning of dismissal law in South Africa.

The Industrial Court was given powers to determine disputes between the employer and an employee and decide on whether the dismissal was fair labour practice. The new democracy required an overhaul of the Labour Relations Act.

The Ministerial Task Team was mandated to draft a bill that would, among other things, provide a simple procedure for the resolution of disputes through statutory conciliation, mediation and arbitration, and the licensing of an independent alternative dispute resolution services.²²¹

²¹⁷ *Supra* note 190.

²¹⁸ Finnemore and Van der Merwe *Introduction to Industrial Relations in South Africa*, 2nd ed 21.

²¹⁹ Grogan *Dismissal Discrimination and Unfair Labour Practices* (2005) 7.

²²⁰ *Ibid.*

²²¹ *Supra* note 6.

It is as a result of the process above, that the Labour Relations Act 66 of 1995 was enacted. One of its objectives was to comply with international standards and to give effect to the Constitution.²²²

It is important to note that both the National Joint Advisory Council (NJAC) in the UK and the Ministerial Task Team in South Africa diagnosed similar problems in respect of the manner in which dismissals were dealt with in the past.

The NJCA stated that:

*“Giving workers a greater sense of job security enhanced industrial relations. Arbitrary dismissal led not only to industrial action, but left a trail of bitterness and distrust.”*²²³

On the other hand, in their report, the Ministerial Task Team found that:

“International research shows that our system of adjudication of unfair dismissals is probably one of the most lengthy and most expensive in the world. And yet it fails to deliver meaningful results and does not enjoy the confidence of the users. Not surprisingly, dismissals trigger a significant number of strikes.”

From this point of view, it becomes a bit clearer why there are similarities in the current legislation dealing with dismissal procedures for both countries.

3.2 Legal Position

United Kingdom (UK)

Section 94(1) of the ERA stipulates that an employee has the right not to be unfairly dismissed by his employer. Section 98(1)(b) also states that there must be a fair reason for dismissal and the reason can be capabilities or qualifications, conduct, redundancy, contravention of a statute and some other substantial reason.

It is clear from the above that dismissal cannot be done at will, but must be for the reason stated in the said sections. This is accordingly compliant with Convention 185. As already stated, this balances the rights of both employees and employers.

²²² S 1 of the LRA.

²²³ *Supra* note 208 at 120.

Furthermore, the Employment Act describes a framework for statutory and disciplinary procedure.²²⁴ This is to ensure that the employee is afforded rights to fair procedure during the pre-dismissal enquiry.

In the UK system, a referral to the Employment Tribunal (ET) is submitted to the Tribunals Service using an ET1 form, where the matter is then referred to the Advisory, Conciliation and Arbitration Service (ACAS). Here a conciliator will seek to obtain a resolution on the matter without the need for it to be heard by the ET. However, the parties are under no obligation to enter into the conciliation process if they do not wish to.²²⁵ The conciliator is required to seek re-engagement or reinstatement of an applicant, if relevant, but this is rarely achieved. ACAS is an independent body, which is mainly funded by the government.

In the circumstance where conciliation fails, the matter proceeds to a full hearing at the ET. Employment Tribunals (ETs) are headed by a legally qualified person now referred to as a judge, with two side members, one with experience as an employer/manager and the other with experience in representing employees, for example, a trade union officer. Originally, it has been designed as a type of ‘people’s court’ where no legal representation was required or expected. It is now common practice for the individual applicant to be represented either by a trade union or a legal officer.²²⁶ Around three quarters of employers are legally represented. As explained later, recent years have seen the growth of ‘no win, no fee’ solicitors. Appeals concerning decisions of ETs are heard by the Employment Appeal Tribunal (EAT) and decisions of the EAT are heard by Court Appeal, whose decision can be appealed at the Supreme Court (Formerly known as the House of Lords).²²⁷

One outstanding feature of the Employment Act is that it gives the ET power to decide a matter without a hearing.²²⁸ In order to use this power, the ET needs written consent from both parties.²²⁹ However, this provision has not been used and all cases have been heard by a full

²²⁴ Act of 2008 Schedule 2 of the Act.

²²⁵ S 18(2).

²²⁶ Purcell, UK “Individual disputes at the workplace – alternative dispute resolution”
<http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/united-kingdom/uk-individual-disputes-at-the-workplace-alternative-disputes-resolution>
2010-02-09 (accessed 2015-04-24).

²²⁷ *Ibid.*

²²⁸ S 7 (3A).

²²⁹ S 4.

panel.²³⁰ The Employment Act also provides that ACAS's duty to conciliate continues and subsists throughout the proceedings until the tribunal delivers a judgment.²³¹

It is of interest to note that the ET has the power to increase an award in favour of the employee by up to 25% in cases where the employer unreasonably failed to comply with dispute resolution procedures, for example, where the employer unreasonably refused conciliation.²³² Equally, the tribunal can also decrease an award of an employee by up to 25% if s/he unreasonably fails to partake in conciliation.²³³

3.3 Comparison

United Kingdom and South Africa

The analysis above confirms that South Africa's legal history is largely influenced by that of the UK. This emanates mainly from the colonial history between the two countries.²³⁴

There is no dispute that the dismissal laws of the two countries are identical and that they also conform to Convention 158 of the ILO.

Historically, I have identified the background which led to the system of the two countries to be similar. Thus, it comes as no surprise that the statutory dispute mechanisms are almost the same for settling labour disputes. However, it is important that certain traits are dissimilar and similar for the purpose of assisting South Africa.

The conciliation process is not voluntary for the parties in dispute in the UK compared to South Africa.²³⁵ In the South African context, the removal of mandatory process can be helpful in fast-tracking the dispute resolution system because, as stated earlier, most parties especially employers do not attend these proceedings.²³⁶ Moreover, in some circumstances, parties have adversarial relationships, which will render the process useless.

Another important factor to consider is that the Employment Tribunal is made of a panel of three persons, namely, a legally qualified person, an erstwhile trade unionist and an erstwhile

²³⁰ Employment Act 2008 explanatory notes.

²³¹ S 6.

²³² S 207 (A).

²³³ S 207(3).

²³⁴ *Supra* note 190.

²³⁵ *Ibid.*

²³⁶ See page 20 of this paper above.

employer representative.²³⁷ This differs from the South African System where there is an arbitrator who decides the matter on her/his own. It is submitted, that to a certain extent, this composition can go a long way in reducing the number of matters taken on review or appeal. This is simply based on the notion that two heads are better than one. It is not easy for three people to miss a point; one person can miss or misunderstand a point being made by one of the parties.

Another distinction to be drawn is the fact that in the UK, a party that is unsatisfied with the outcome of the arbitration, may appeal to the courts. This differs from South African law, which only allows for a review process at the Labour Court. The appeal process, I submit, might be faster compared to a review. This is because the Labour Court cannot review a dispute unless the records of arbitration are available. In appeal circumstances, the court can simply base their appeal on arguments submitted and not necessarily on all the records. Secondly, until the *Heroldt* judgment,²³⁸ South African courts had been dealing with the concept of how the review process must unfold instead of developing the law of dismissal itself.

Despite these differences, it is important to note that both the CCMA and ET allow for legal representation. This creates the same problems that have been identified in South Africa in relation to resolving the matters with speed. In addition, both institutions are state-funded.

3.5 Conclusion

South Africa and the UK have a political umbilical cord as a result of the latter colonising the former during the 18th Century. As a result, the two countries share an almost identical legal system.²³⁹

Secondly, due to unrelated changes that took place in their political landscape, their labour laws changed for the better. In the UK, around 1970s, when Margaret Thatcher took over, the *laissez-faire* principle was abolished. In 1979, when black trade unions were gaining more momentum, a need for a change in labour law could not be avoided.²⁴⁰

Around 1980 to 1990, both countries enacted legislation that took job security of employees seriously, but more importantly for this paper, legislation that established for employment

²³⁷ *Supra* note 221.

²³⁸ See page 22 of this paper above.

²³⁹ *Supra* note 193.

²⁴⁰ See page 42 above.

disputes resolution structures, which were meant to protect employees and be speedy and efficient.²⁴¹

Both countries, as members of ILO, conform to the standards of this organisation, most importantly, to Convention 185 regulating the process of dismissal of employees. Both countries have independent tribunals dealing with dismissal cases. However, the only issue to be addressed pertains to the improvement of these institutions.

South Africa, realising that the system is not efficient like it is supposed to be, has recently amendment its labour legislation to improve the situation. It remains to be seen if these will be effective. Conversely, the UK did not develop a complex structure as South Africa did.²⁴² In this regard, it is important to see how the Seventeenth Amendment and the LRA amendments will assist in this regard.

In the comparison between the two countries, certain aspects of the UK have been identified, which can be helpful to South Africa, for example, aborting the review structure, increasing the panel of arbitrators in a dispute, and relaxing the need for conciliation at the CCMA.²⁴³

²⁴¹ See pages 44 of this paper above.

²⁴² See pages 30 - 34 of this paper.

²⁴³ See page 45 of this paper.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

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4.1 CCMA

After the hard work of ushering in a new democracy, South Africa underwent a series of changes to rid itself of the apartheid era laws and enact laws conforming to the Constitutional democracy. From 1994, all laws had to conform to the Constitution,²⁴⁴ and the Labour Relations Act was introduced to deal with the deficiencies of the past.²⁴⁵

One of the founding principles of the LRA was that it must create a mechanism that will enable speedy and effective resolution of disputes. Consequently, the LRA created the CCMA, Labour Court and Labour Appeal Courts.²⁴⁶ On the other hand, the Constitution created the Supreme Court of Appeal and the Constitutional Court.²⁴⁷

The CCMA uses a two-pronged system known as conciliation and arbitration. Conciliation is meant for parties try to settle the dispute in front of a commissioner. No legal representation is allowed and there is no exception to this rule.²⁴⁸

In my view, one of the problems relating to conciliation is that in most cases, parties do not show up, especially the employers. This results in a certificate of non-resolution being issued.²⁴⁹ There is no consequence for such an employer as the rules are quiet on this aspect. This results in matters that could be resolved in conciliation to be referred to arbitration, resulting in unnecessary clogging up of the system.

Contrary to the conciliation process, the arbitrator must make a decision on the fairness of the dismissal within 14 days after hearing the matter. During these proceedings, legal representation is allowed in certain cases.²⁵⁰ I submit that the allowing of legal representation in these cases goes against the spirit in which the LRA was drafted. It has been correctly stated by commentators that the use of lawyers in these proceedings, which were supposedly meant to be simple, results in it becoming legalistic and technical, and the availability or non-availability of lawyers result in long postponements.²⁵¹ The CCMA should have used the judgments of the SCA as a motivation to scrap the use of lawyers from the CCMA.

²⁴⁴ 1996.

²⁴⁵ See page 2 of this paper above.

²⁴⁶ *Ibid.*

²⁴⁷ See page 31 of this paper above.

²⁴⁸ See page 15 of this paper above.

²⁴⁹ *Ibid.*

²⁵⁰ See page 16 of this paper above.

²⁵¹ See page 21 of this paper above.

The other issue of concern is the increase in the number of cases that the CCMA receives per year. The number doubles every year as a result of the decline in the economy and increase in the number of wild cat strikes.²⁵² I do not succumb to a suggestion that perhaps there should be costs ordered against frivolous claims brought to the CCMA, as that will scare the vulnerable workers for whom the institution was meant to assist. However, I suggest that more human resources can be trained to scan referrals as they come in. This will curb frivolous referrals and reject referrals, which should not form part of the CCMA jurisdiction.

The new Amendment to the LRA²⁵³ allows for execution of the award to be much quicker and accessible. Previously, once an employee received an award in his/her favour, they would have to get the award certified by the CCMA, which could only be executed once a writ of execution had been issued by the Labour Court. In the amendment, the award is final and binding and can be executed as if it is were an order of court out of which a writ has been issued. This is progressive. However, one wishes that enough commissioners would be employed to fast track the certification process at the CCMA.

4.2 Labour Courts

Section 145 of the LRA regulates how the awards must be regulated. The grounds for review are well documented. The commissioner must have committed misconduct in relation to her/his duties, gross irregularity, or must have exceeded his/or her powers. *Sidumo*²⁵⁴ also added that these grounds are suffused to the constitutional standards of reasonableness.²⁵⁵

The Act further states that review applications must be brought within six weeks after the receipt of an award. In my view, six weeks amounts to almost 2 months and that on its own goes against the spirit of resolving disputes speedily.

It is also not logical that commissioners are forced to release their awards within 14 days, and thereafter, parties have six weeks to decide whether to review or not. I submit that two or three weeks is a reasonable period in which to launch a review application, considering that this process is, by nature, urgent.²⁵⁶ My submission takes into consideration that despite the lengthy

²⁵² See page 19 of this paper above.

²⁵³ Act 6 of 2014.

²⁵⁴ *Supra* note 137.

²⁵⁵ See page 23 of this paper above.

²⁵⁶ See page 25 of this paper above.

six weeks' period given to parties, the Act also allows for parties to apply for condonation to file after the six weeks' period.

Another important aspect to be considered or reviewed in relation to the review process is the failure by the CCMA or commissioners to keep or file records of dispute properly. Rule 7A(2) requires the CCMA to dispatch the record to the parties once called upon to do so by the applicant. In most cases, this has proven to be a nightmare as the records go missing and are nowhere to be found. In this regard, the Act must tighten the screws on the CCMA to be accountable in this regard because as stands, no one becomes accountable when records go missing but the applicant who wishes to review the award.

Having stated the above, the LRA amendments do try to expedite the review process, parties are now expected to have finalised their pleadings within six months and judges are now, in terms of the Norms and Standards for the Performance of Judicial Functions, expected to give their judgments within three months after the matter has been heard.²⁵⁷

4.3 The Constitution

It is now trite that the Constitution is the supreme law of South Africa and any law or conduct inconsistent with it is invalid.²⁵⁸ Importantly, the Constitution also guarantees rights to fair labour practice.²⁵⁹ The first two sections which had an effect on dispute resolutions are section 167(3) and 169(3).

Section 167 confirmed the CC as the highest court in all constitutional matters while section 168 gave the SCA powers to be the highest court in all appeal matters except constitutional matters. This accordingly defeated the whole purpose of having speedy resolution of matters as it meant the LAC was not the final court of appeal in labour matters, but the SCA was.²⁶⁰

It took 15 years for the state to correct this deficiency with the seventeenth amendment of the Constitution. The said amendment accordingly amended section 168 to limit the powers of SCA to all matters except labour and competition law matters. Another development in this

²⁵⁷ *Supra* note 170.

²⁵⁸ S 2.

²⁵⁹ S 23.

²⁶⁰ See page 32 of this paper above.

regard was that section 167 also gave the CC powers to be a court of appeal in all matters and thus, the SCA seized to be the highest court in relation to all appeal matters.²⁶¹

Even though the amendment was crucial in removing one court of appeal from the process, one wonders if it will not be correct to have the Labour Court and the Constitutional Court only dealing with labour matters. I suggest this because while waiting for the court process and appeal to be completed, an employee is stranded at home, whilst on the other hand, the employer needs to make business decisions in relation to the post of the dismissed employee.

4.4 International Labour Organization

Section 39 of the Constitution requires our courts to consider international law when interpreting the Bill of Rights. Furthermore, section 233 states that when interpreting any legislation, we must do so consistently with international law.

This automatically mean South Africa is bound by the ILO conventions and recommendations. Convention 185, which is relevant for the procedure of terminating employment relationships, is thus binding on South Africa.

There is nothing contentious in this regard as our LRA requires that before an employee is dismissed, s/he must be given an opportunity to be heard. Furthermore, if an employee is unsatisfied with a dismissal, s/he must be able to refer the matter to a body independent of the employer. All these elements are contained in both the LRA and C185.

4.5 Comparison between United Kingdom and South Africa

The two countries share similar legal jurisprudence as a result of the political history they shared in the past. It was thus necessary to compare the two as even their principles and rules relating to dismissal law are the same.

The UK has a similar body to the CCMA known as Employment Tribunal (ET). At the ET, conciliation is voluntary as compared to South Africa where it is mandatory. The removal of conciliation is, in my view, helpful in cases where it is clear that parties would not reconcile

⁶¹ See page 33 of this paper above.

for any reason. This may assist the CCMA to save on time and resources, as parties can go straight to arbitration.

ET is made up of a panel of three people, a former trade unionist, a legally qualified person and a former member of an Employer Organisation.²⁶² This in my view is a panel of experienced people in the labour field who can come up with sound arbitration awards, thus reducing a number of awards going for review. This also takes away any perception of bias.

In South Africa, we rely on one commissioner who may misunderstand issues and who does not have benefit of a second or third person, thus exposing her/his award to be reviewed.

Another critical distinction is that a party that is unsatisfied with the ruling of the ET goes straight to court for an appeal instead of a review. Thereafter it can go to appeals court. This, in my view, will be more effective and will do away with legalities of how to review rather than putting an emphasis of fairness of dismissal.²⁶³

In closing, our labour dispute resolution system under the auspices of the LRA and the Constitution gives employees and employers a fair opportunity to state their cases in relation to dismissal through various forums created. Employees, even those who cannot afford it, can approach an independent body for free to express their dissatisfaction with their dismissal. The employers also are given a chance to respond to the challenge. The main issue and worry, which runs the thread of this paper, is the speed in which these matters are brought to an end. As stated, more could still be done to process the disputes quicker.

²⁶² See page 46 above.

²⁶³ *Ibid.*

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