LEGAL REPRESENTATION AT THE

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

by

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ABSTRACT

The right to legal representation at the Commission for Conciliation, Mediation and Arbitration was initially not recognized in South Africa as it was not recognized by the Roman Dutch Law in respect of administrative tribunals. This right was gradually introduced into administrative tribunals although exercisable only with the consent of all parties. The position was subsequently modified and the right can now only be exercised subject to the discretion of the arbitrator although that right is not automatically available to misconduct and incapacity hearings.

The question became whether the limitation in the exercise of the right is justifiable more particularly since the dawn of the new constitution in South Africa. There are two cases which were decided by the Supreme Court of Appeal where it was stated that the limitation is not unconstitutional. Both cases were referred to the Constitutional Court which could not make an unequivocal pronouncement on this issue. With this background this mini-dissertation seeks to examine whether the Constitutional Court is likely to decide consistently with the Supreme Court of Appeal or would find in favour of the disputants claiming that the limitation is unconstitutional.

The mini-dissertation will in addition present a comparative survey from different jurisdictions on the right to legal representation, challenges faced by the dispute resolution institutions and possible solutions.

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CHAPTER 1
INTRODUCTION

1. Introduction

The South African legal system has established specialised labour resolution institutions aimed at adjudicating labour disputes between employers and employees. These institutions should remain impartial and transparent to earn the respect of the interested parties. The interested parties will include the business community and, importantly, investors that play a crucial role in the economy of the country as their investment decisions are informed by, *inter alia*, reliability, predictability and stability of the dispute resolution system. The effectiveness of the adjudication process, therefore, should be assessed to determine and establish whether the objects are attained and, if not, what the challenges are, and to identify possible solutions. One of the pillars of the establishment of the specialised labour dispute resolution institutions is accessibility, and the question arises as to whether the legal representation of parties is a prerequisite for the parties to access these institutions effectively, specifically at the Commission for Conciliation, Mediation and Arbitration (CCMA).

2. Background and Problem Statement

This dissertation will provide the background and the motivation for the establishment of the specialised dispute resolution institutions and, thereafter, will identify challenges impacting on the realisation of the objectives. The critical ideals underpinning the

establishment of the institutions were premised on the fact that the previous regime on dispute resolution was not effective and needed to be overhauled. The ideals identified were, *inter alia*, the need to establish a coherent legal jurisprudence; the need to have a system which is accessible and which provides an expeditious resolution of disputes; and, furthermore, a system which is affordable.

The challenges faced by the institutions include the capacity of the institution; systemic constraints; dysfunctional internal processes; the effectiveness of court orders (and awards); and the failure to resolve disputes expeditiously. Possible solutions will be explored and recommendations will be outlined to enhance their effectiveness. In the process, the research importantly will explore the extent to which the said challenges and solutions interplay with the role or limited legal representation before the CCMA.

The question whether parties are or should be entitled to unrestricted or unlimited legal representation during arbitration hearings before the CCMA has been eluding the rank and file in the legal fraternity. The fairness or otherwise of these restrictions has been the subject of discussion and legal battles in South African courts. The Constitutional Court was seized with this question in 2009 in *Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau (NO) and Others,*[1] (*Netherburn* Judgment-CC). However, a decision could not be made since section 21 of the Labour Relations Amendment Act[2] read with rule 25(1) of the CCMA rules[3] which was under attack was repealed before the Court could adjudicate thereon.[4] It could be argued that to the extent that the Constitutional Court has not made a pronouncement on the question of legal representation during arbitration proceedings before CCMA, the proverbial jury is still out.[5]

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[1] 2010 (2) SA 269 (CC).

[2] Act 12 of 2002.

[3] Promulgated on 25 July 2002.

[4] This is also confirmed by the full bench in the case of *The CCMA and Others v The Law Society of Northern Provinces (*2013) 34 ILJ 2779 (SCA), at par 1.

[5] "The question of the constitutionality and meaning of CCMA rule 25 thus stands over for another day". *Ibid* note 4 at par 13. It should be noted, however, that the Supreme Court of Appeal has decided on this issue, both in the *Netherburn CC* judgment and *Law Society SCA* judgment.

In 2013 the North Gauteng High Court[6] was seized with the same issue of legal representation in arbitration proceedings in *The Law Society of Northern Provinces v CCMA and Others (Law Society* judgment - Gauteng Division).[7] The judge sitting referred to section 3(3)(a)[8] of the Promotion of Administration of Justice Act ("*PAJA*")[9] which states that the administrator is expected to provide and allow legal representation where matters are serious and complex and, since CCMA rules only consider complex cases, it fell short of the standard prescribed by PAJA. The judge further stated that the limitation for legal representation only applied to capacity and misconduct cases and this appeared to be arbitrary. The judge concluded that the impugned rule was unconstitutional.[10]

The decision by the Gauteng Division was reversed by the Supreme Court of Appeal in 2013, in *CCMA and Others v Law Society of the Northern Province*[11] (*Law Society* judgment - SCA). The Court, *inter alia,* decided that NGHC was misdirected in employing PAJA to adjudicate over the *lis* as this was not the case argued and presented by Law Society of the Northern Provinces (LSNP). The Court further concluded that the constitutional provisions which founded *LSNP*'s case in fact had not been infringed and, therefore, decided that the limitation to legal representation as envisaged by section 21 of Labour Relations Amendment Act read with rule 25(1) of the CCMA rules was not unconstitutional. The Court concluded after a historical exposition that the courts had consistently denied the right to legal representation in fora other than courts of law.[12]

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[6] Now renamed Gauteng Division.

[7] *Law Society Northern Provinces v Minister of Labour and Others* 2013 (1) SA 468 (GNP).

[8] Section 3(3)(a) provides that "in order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her discretion, also give a person referred to in subsection (1) an opportunity to-
(a) obtain assistance and, in serious or complex cases legal representation."

[9] Promotion of Administration of Justice Act, Act 3 of 2000.

[10] See note 7, at par 43

[11] *CCMA and Others v Law Society of the Northern Provinces (incorporated as the Law Society of Transvaal)* (2013) 34 *ILJ* 2779 (SCA).

[12] Innes CJ in *Dabner v South African Railways and Harbour* 1920 AD 583 stated that "[n]o Roman Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none."

3. Motivation for Study

The motivation for the study is threefold, namely, first, to outline the purpose for the establishment of speciliased labour dispute resolution bodies; second, to identify challenges faced by the institutions and further to provide possible solutions; and, lastly to examine the *Law Society* judgment - Gauteng Division. The subsequent appeal by the CCMA will also be examined to determine whether the question of legal representation in arbitration proceedings can be considered to have been satisfactorily resolved such that the Constitutional Court is likely to accept this as a *fait accompli*. In addition, a comparative study will be presented to consider both the motivation behind the establishment of the specialised institutions and the role played by legal representatives.

The study will also examine the question whether justification remains that the right to legal representation should not be limited as countenanced in a number of court decisions. The following observations were made by presiding judges and authors:

a) Tuchten J, in the *Law Society* (Gauteng Division) judgment stated that dismissal is as harsh as the death penalty and, further, that one's job is a major asset and losing a major asset cannot be considered a less serious issue.[13] The Supreme Court of Appeal[14] stated that the individual consequences of dismissal should not be underestimated. Musi J, who dismissed the argument that restricting legal representation is unconstitutional, did state in *Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau (NO)* (Netherburn LAC judgment) that "dismissal will always entail adverse consequences for the employee, in particular".[15]

b) Van Zyl J stated in *Lace v Diack* that the time may well come when public policy may demand that such a right should not be limited.[16]

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[13] See page 19 par 30.
[14] *See* footnote 10, at page 14 par 21.
[15] Netherburn Engineering case, par 30 of Musi JA's judgment.
[16] 1992 13 *ILJ* 860 (W).

c) Paje J, raised a question in *Cuppan v Cape Display Supply Chain Services* whether common law should be developed and considered in relation to public policy[17] to ensure that the right to legal representation is extended and subsequently be unrestricted to tribunals such as the CCMA.

4. The Primary Research Question

The primary object for the dissertation would be to critically identify the purpose and challenges faced by the labour disputes resolution institutions and, importantly, to determine the impact of the limitation of the right to representation of the parties by legal practitioners before the CCMA.

5. Research methodology

The study follows a historical exposition following both the primary and secondary sources and literature, including journals, international and national statutes, case law, South African and international case judgments and international conventions. A comparative study will be undertaken with specific reference to the United Kingdom and Swaziland. In addition to a review of case law and literature, research papers and websites will be reviewed. The full citation will be given in the first note and subsequent citations will be abbreviated as set out in the bibliography. A shortened version of the source will be used in the footnotes and a complete version will be found in the bibliography.

6. Overview of Chapters

Chapter 1 provides a general introduction of the dissertation; the research question is set out and the parameter of the research is defined. The motivation of the study is explained and the research methodology, including the referencing, is explained.

Chapter 2 outlines in detail the purpose for the establishment of specialised labour dispute resolution institutions.

[17] 1995(4) SA 175.

Chapter 3 deals with the challenges faced by the dispute resolution institutions and further sets out possible solutions to the challenges stated.

Chapter 4 discusses the background of the limitation of the right to legal representation in South Africa, culminating in the discussion of the judgments that adjudicated over disputes as to whether the right to legal representation before the CCMA should be unlimited.

Chapter 5 explores a comparative study on the reasons for the establishment of specialised dispute resolution institutions and the impact of the limitation of the right to legal representation before labour dispute tribunals.

Chapter 6, the conclusion, contains a summary of the chapters and sets out the shortfall of the current system setting out the motivation for the changes.

CHAPTER 2

SPECIALISED DISPUTE RESOLUTION INSTITUTIONS

1. Introduction

The dispute resolution system in the labour law discipline of South Africa was first introduced in 1924 through the promulgation of the Industrial Conciliation Act 11 of 1924[18] (Industrial Conciliation Act). Benjamin[19] observes that it provided for the recognition and registration of trade unions and employers' organisations and also for the framework that relates to the regulation of collective bargaining, dispute resolution and industrial action.

The Industrial Conciliation Act was amended in 1937[20] and subsequently in 1956[21] (1956 Act). The 1956 Act established an Industrial Tribunal which was aimed at arbitrating disputes, although it was limited to job reservation disputes and not to all labour

[18] Bhorat, Pauw and Mncube "Understanding the efficiency and Effectiveness of the Dispute Resolution System is South Africa: An Analysis of CCMA Data." September 2007, Development Policy Research Unit. This Act excluded African employees until the revolt by Africans which led to the establishment of the Wiehahn Commission in 1977. The recommendations of the Commission led to the amendment of the Industrial Conciliation 1956 Act and then renamed the Labour Relations Act 1956.

[19] Benjamin "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration" working paper no 47, International Labour Office Geneva April 2013 at p2.

[20] Industrial Conciliation Act 36 of 1937.

[21] Labour Relations Act, Act 28 of 1956.

disputes.[22] Van Eck, who summed up the historical exposition, points out that "the Industrial Court replaced the Industrial Tribunal which was established by the Industrial Conciliation Act 28 of 1956".[23] As will be shown below, legal representation could not be traced from Roman-Dutch Law. The introduction of legal representation, though limited, became clear in the 1937 and 1956 Acts.

The rationale underpinning the establishment of specialised resolution institutions was considered by the Commission of Inquiry[24] headed by Wiehahn, wherein it was observed that "the ordinary courts had the wrong sort of procedure and evidential rules for the purpose, and litigation before them was too slow and costly".[25] Brassey *et al* also noted that labour law had expanded and, as such, special attention was required. In this regard, the authors quoted with approval the sentiment that "the time has come for those rights derived from labour law to be adjudicated more appropriately - in a labour court. The aim was to encourage judicial rather than strike action."[26]

At the time of the Wiehahn Commission, the international community had already swayed in the direction of establishing specialised fora and the Commission's recommendation had to follow suit.

The current regulatory framework[27] in South Africa is governed by the Labour Relations Act[28] (LRA) which introduced three main disputes resolution institutions, namely, the Commission for Conciliation, Mediation and Arbitration (CCMA); the Bargaining Councils; and the Labour Court (with a Labour Appeal Court). This dissertation will present the basis

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[22] Ibid.

[23] Van Eck "The Constitutionalisation of Labour Law: No place for a Superior Court in Labour Matters (Part 1): Background to South African Labour Courts and the Constitution." 2005 *Obiter* 549 at p550.

[24] Established in 1977.

[25] Brassey, Cameron, Cheadle & Olivier *The New Labour Law* 1987 at p9.

[26] Brassey *et al* at p9. Benjamin "Conciliation, Arbitration and Enforcement: The CCMA Achievements and Challenges" (2009) 30 *ILJ* 26 at p27 also commented that "[s]ince the enactment of the LRA there has been a very substantial decrease in the number of strikes over dismissal and other disputes of right."

[27] As discussed in detail in chapter 4 of this dissertation.

[28] Labour Relations Act, Act 65 of 1995.

for the establishment of the specialised tribunal resolution institutions, with specific reference to the CCMA as expounded by different authors and judges.

The specialised dispute resolution institutions are established to achieve the following goals, namely, to resolve labour disputes expeditiously; to make the process affordable, less formal or rigid; and to develop expertise[29] in this realm of the law. This chapter will explore the aforegoing goals and further put forward the summation whether the said goals are still relevant in our system. In addition, the question will be considered of how the presence of legal practitioners impact on these goals. This chapter will be followed by a discussion of current challenges to the system and suggested solutions thereto.

2. Development of Coherent Legal Jurisprudence

One of the primary purposes of the specialised institutions is premised on the establishment of coherent legal jurisprudence in the field of labour law. This was confirmed by Bosch[30] who stated that "[o]ne of the potential benefits of a specialised court is a coherent jurisprudence crafted by judge's expertise in their particular field".[31]

The legislature in South Africa passed a statute[32] which establishes the National Economic, Development and Labour Council (NEDLAC) comprised of social partners.[33] The primary responsibility of the social partners is to promote and foster the development of effective policies to promote the necessary economic growth, participation in economic decisions and social equity in South Africa. In addition to the establishment of the

[29] These have been summarised by Van Eck 2005 *Obiter* at p552. See also Benjamin at p26 who observes that the creators of the CCMA had the ambition to "establish an institution that could provide accessible, cheap, quick and non-technical dispute resolution in the most common categories of labour disputes". The mandate of the CCMA would be to resolve disputes in such a manner that seeks to avoid the technicality and delay that are such a dominant feature of litigation process. Van Niekerk J in the unreported judgment of *Hlabiwa v Desmond Lynch and Others,* Case JR 213/2005 delivered on 2 October 2014, at par 4, stated that "the purpose of LRA is to promote expeditious dispute resolution" at para 4.

[30] Bosch "An evaluation of the Labour Court" *The Dispute Resolution Digest* 2015, p34.

[31] *Ibid* at p34.

[32] Nedlac Act 35 of 1994.

[33] Comprising of representatives of organised business, organised labour, state and organisations of community and development interest.

NEDLAC, the government passed the LRA which *inter alia* established the CCMA.[34] The CCMA was established to provide a dispute resolution system characterised by expediency, accessibility, proximity, relatively low legal costs and specialised expertise.[35] These characteristics had an influence in South Africa when the labour law regime was reconstructed in 1995.[36] The direction taken by the South African government in the establishment of NEDLAC and the CCMA was hailed by the director of the International Labour Organisation who considered the "the South African institutions as a great success and a model that should be followed particularly by emerging economies".[37]

A body of expertise and jurisprudence is established by having individuals who focus exclusively on labour disputes, unlike in the general courts where judicial officers attend to different legal disputes and, as such, fail to become experts in the field. Preference to this institution would be on the basis of what the Supreme Court of Appeal refers to as "imperative of institutional expertise".[38] The lack of specific expertise will give rise to more injustice in labour disputes and will further delay the resolution of disputes. Le Roux observes in this instance that "expertise is necessary not only to apply and adapt existing

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[34] Section 112 of the LRA. CCMA replaces the old conciliation boards of the 1956 Act, see Grogan 2007 at p438. "The CCMA has the power to license Private Agencies and bargaining Councils to perform any or all of its functions."

[35] Fernwick and Novitz, *Human Rights at Work: Perspectives on Law and Regulation* 2010, at p285. Also referred to by van Niekerk *et al*, *Law@work*, 3rd edition 2015: "The main reasons for the establishment of specialist dispute resolution structures include the need for expeditious, efficient and affordable procedures and easily accessible, specialist but informal institutions." See also Butterworts forms and precedent at DSP(1) – 5 "The LRA, therefore, establishes a simple approach to dispute resolution in order to overcome lengthy delays, to save on exorbitant costs and to reduce the level of strike." Botma-Kleu and Govindjee: The Role of reasonableness in the review of CCMA Arbitration Awards in South Africa – an English Comparison, at p1777 remarked that "the legislature has introduced mechanisms to ensure a quick, cost effective and final resolution of labour disputes". See also Le Roux "Substantive Competence of Industrial Courts" 1987 *ILJ* 183 at p194 "bodies have been created in the interest of providing speedy, efficient, inexpensive and informal institutions for resolution of disputes."

[36] *Ibid* footnote 34, Fernwick and Novitz at p289, The Explanatory Memorandum which accompanied the bill also stated 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."

[37] Van Vuuren "Time for reality check – stop playing marbles while Rome is burning" *The Dispute Resolution Digest* 2015 at p4.

[38] Referred to by Van Eck and Mathiba, "Constitution Seventeenth Amendment Act: thoughts on the jurisdictional Overlap, the Restoration of the Labour Appeal Court and the Demotion of Appeal" (2014) 35 *ILJ* 863 at p866.

legal principles to the labour sphere but also in certain circumstances, effectively to exercise public policy discretions granted to them in terms of the statutes".[39]

Le Roux notes that due to its specialised posture, a particular jurisprudence is being developed with specific reference to the former Industrial Court and in the exercise of its functions, Le Roux observed that "[t]he court has built up a new jurisprudence relating especially to the dismissal of workers, where the harshness of common-law contract principles has been nullified and where the principles of equity and fairness within the context of the employment sphere have been formulated and applied".[40]

Other jurisdictions have a similar approach and, in this regard, it has also been noted that both Australia and the UK have taken the same direction. Bhorat *et al*[41] note that "among the intended purposes of the new LRA was the promotion of an effective and efficient labour dispute resolution system in order to overcome the lengthy delays, to save costs and to reduce the incidence of industrial action which characterised the apartheid dispensation".

The South African Constitutional Court has also buttressed the argument regarding the creation of expertise, and in this regard Ncgobo J stated that "through their skills and expertise judges of the Labour Court accumulate expertise which enables them to resolve labour disputes speedily".[42]

Hepple[43] provides a dissenting view in as far as the administration of justice and development of jurisprudence are not dependent on the establishment of a specialised tribunal. He states that "equity and sympathy for the worker (albeit a paternalistic one) is

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[39] Le Roux at p193, see note 35.
[40] Ibid at p197, see note 35.
[41] Bhorat *et al* at p2, see note 18.
[42] *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 *ILJ* 95 CC par 22. This case was also referred to by Van Eck "The Constitutionalisation of Labour Law: No Place for a Superior Court in Labour Matters (Part 2): Background to South African Labour Courts and the Constitution." 2006 *Obiter* 20 at p27.
[43] Hepple "Labour Courts: Some Comparative Perspectives" 1988 *Current Legal Problems* 169.

not the monopoly of labour courts. It is far more to do with age, background and training of the judiciary and the social and legal and political climate in which they may operate than with the existence of a separate labour court."[44] Notwithstanding Hepple's view, the author notes that in the Federal Republic of Germany labour law judges are placed on probation for a period of four years and thereafter appointed permanently.[45]

The legal representation in the Labour Court does enhance the development of expertise, and their ability to refer to previous judgments, both in local and international jurisdictions. This will extend the interpretation and application of the Bill of Rights and the Constitution generally. The ultimate expertise will also benefit the adjudication of disputes at the CCMA.

3. Less Rigid Process

The LRA prescribes that the procedure to be adopted by the commissioners in the adjudication of disputes should be less formal with limited legal formalities and jargons.[46] The interpretation of judgments demonstrates that the foundation of adjudication over labour disputes is underlined by policy-oriented complexion.[47] In this regard, Le Roux notes that "most lawyers involved in industrial relations in South Africa will attest to the fact that legal principles (as well as their techniques and institutions) can sometimes only play a limited role in the resolution of a dispute, even if it is concerned with rights".[48] In view of this acknowledgment by lawyers, it follows that legal representation is not *per se* a *sine qua non* for the attainment of justice for employees, more particularly at disciplinary hearings and, second, at the CCMA.

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[44] *Ibid* at p173.

[45] At p191, see note 43.

[46] In the words of Brassey *et al*, at p10, the CCMA "should have a wide discretion so that it could do justice unhampered by technicalities". Brassey *et al*, at p13 further refers to *Mawu v Natal Die Castings Co* (1986) (IC) at 544 G-H where it was stated that "the revolutionary character of sound labour relations in South Africa prompt me to hold that a party which has followed the letter and the spirit of the Act should in proper circumstances not be check-mated by a purely legalistic approach and a hesitancy to adopt a firm stand".

[47] See Le Roux at p196, see note 43.

[48] At p193, see note 28.

The concept of not being legalistic and inflexible was observed in the Wiehahn Report where it was stated that the specialised fora should not be bound by ordinary court rules of evidence and procedure.[49]

Jordaan and Davies,[50] who conducted a comparative study, noted that this approach had already been adopted in the United Kingdom pursuant to the Donovan Commission where it was also observed that employer-employee disputes "require speedy resolution and, as the new rights were to be pursued by individual employees, a channel of enforcement was needed which was also less formal and expensive than the ordinary courts".[51]

The flexibility feature in the dispute resolution process was also noted by Jordaan and Davies who located a similar characteristic in the Swedish Labour Court system, where it was observed that the procedures in labour courts are "more flexible than those in civil courts".[52] The participation in the adjudication of labour disputes, therefore, would not require any specific knowledge of the rules as required ordinarily in civil courts.

The training of legal practitioners is primarily based on strict *stare decisis*. Further, disputes should be generally based on previous judgments. This will engender the element of rigidity which may be against the quick resolution of disputes. The system should be crafted in such a manner that technicalities will not be entertained.

4. Costs Associated with the Process

The purpose of ensuring that justice is attained for all parties involved in the statute makes provision for limited instances where legal representatives are permitted to appear. In ordinary courts, legal representatives are allowed to raise legal technicalities which, unfortunately, may cause unnecessary delays in the adjudication and finalisation of the

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[49] Brassey *et al*, at 10 also notes that "it was found that the way in which labour disputes were handled by the ordinary courts was creating uncertainty and unrest among employers and employee and causing harm and injustice"

[50] Jordaan and Davis "The Status and Organisation of Industrial courts: A comparative Study" 1987 *IJ* 199.

[51] *Ibid* at p203.

[52] *Ibid* at p210.

adjudication of disputes. In the process of attending to the technicalities, both the employer and the employee suffer, as the employer needs to spend more time in the production, whereas the employee spends a longer time at home awaiting the finalisation of the dispute. Both parties could also be suffering financially as the said legal representatives will be charging fees for the work done. The limitation of legal representation is akin to throwing the baby out with the bath water or not attending to the root of the problem. The procedure should be streamlined in such a way that the raising of technicalities should not be accommodated. It should be noted that even unrepresented employees may consult attorneys before attending the hearing and may still aggressively raise points *in limine*.

The LRA has made provision for forms which can be easily completed by members of the public and, where necessary, with the assistance of the CCMA or the appropriate forum. The simplification of the process renders the need to engage legal representatives unnecessary. This aspect fails to appreciate that the role of the legal practitioners goes deeper than mere assistance on the procedure or the assistance to complete referral forms. Their role is deep-rooted in the administration of justice.

5. Accessibility

The nature of the process before the CCMA is characterised by less stringent legalistic formalities which are prevalent in formal court processes. As a result it is more accessible and less costly to the unskilled majority of ordinary workers. In this regard, Bhorat[53] *et al* note that "the simplicity of the processes is often cited as an important factor in making the CCMA accessible to a large number of workers".[54] Mischke[55] stated that "the efficiency aspects imply that parties should be able to call upon dispute resolutions

[53] Bhorat *et al* at p6, see note 18.

[54] Bhorat *et al* also referred to Molahlehi who stated that "there is a consensus between academic writers and practitioners that the success of the new dispensation and the CCMA lies in the fact that workplace justice has now been made for accessible and less costly for unskilled workers". see note 17 at p6.

[55] Mischke, Key to success – dispute resolution in terms of the Labour Relations Act, *Contemporary Labour Law* 1996, Vol. 5 no 11 at p101.

systems at very short notice, and also that the dispute resolution systems should be able to respond to the needs of the parties in a relatively short space of time."[56]

As alluded to elsewhere, the process should be crafted to make sure that technicalities are curtailed at the arbitration proceedings, alternatively that they be dismissed immediately with an appropriate punitive costs order.

6. Expeditious Resolution of Disputes

The specialised courts were also intended to ensure the speedy resolution of disputes. Benjamin observes that the introduction of the new system was in response to the backlog in unfair dismissal law in the industrial courts, and this had the propensity of causing strikes.[57] It has been noted that the delay in resolution leaves both parties in limbo. Labour disputes need to be resolved quickly to attain certainty within a reasonable time.[58] In this regard, Benjamin[59] observes that the requirement for the referral of disputes to the CCMA was a shorter period of 30 days which was aimed at the "swift resolution of disputes and provides considerable certainty to employers who know that they will not face claims instituted several years after a dismissal".[60]

Hepple[61] opines that the allegation regarding speed and flexibility in the adjudication of labour disputes could be considered a misnomer as his investigation and comparative research established that the very same process as in ordinary courts is being employed in the labour courts, which is characterised by legalism and formalism.[62] The learned author, however, conceded that the argument to have a specialised court holds to the extent that it relates to the creation of expertise in the area. To this end, he stated that

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[56] *Ibid* at 101.
[57] Benjamin at p1 see note 19.
[58] As observed by Van Eck 2005 *Obiter* at p555, see note 23.
[59] Benjamin, see note 19.
[60] *Ibid* at p31.
[61] See note 27.
[62] *Ibid* at 177, see note 43.

"one is bound to conclude that the only features which clearly demarcate labour courts from the ordinary courts are their expertise and specialisation".[63]

Importantly, Hepple advocated the creation of autonomy and the exclusive jurisdiction of labour disputes being left to the realm of the labour courts. This system will entail having "autonomous labour law administered by a specialised judiciary with exclusive jurisdiction".[64] In this regard, the court of final instance could be the Constitutional Court only in instances "where a constitutional right is involved".[65]

The clothing of the Labour Appeal Court (LAC) as being the court of final instance dealing with all matters under the Labour Relations Act cemented and fostered the need for the speedy resolution and at the same time ensuring that the expertise is honed in the relevant fora. The Labour Court (LC) and the High Court have concurrent jurisdiction in constitutional matters.[66] This section brought uncertainty since the elegant exclusivity feature of a labour court could be watered down as the litigants can easily draft and/or frame their claim so as to invoke constitutional infringement and as such refer the matter to the High Court instead of the labour courts.[67] Van Eck[68] also analysed judgments of the LAC which illustrated the assumption by the judges that judgments of the LAC cannot only be appealed to the SCA but also to the Constitutional Court. It was ultimately decided by the courts that the Labour Appeal Court was incorrect in that exposition and the appeal should lie with the Labour Appeal Court and the Constitutional Court.[69]

The assessment of the findings in the aforegoing matters demonstrates that the august virtue of speedy and affordable dispute resolution mechanism would remain a dream

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[63] *Ibid* at 179.
[64] at p185.
[65] at p184.
[66] Section 167(3) of the LRA,
[67] Van Eck 2005 *Obiter* at 559, see note 23.
[68] Van Eck 2002 *Obiter* 20 at p23, see note 42.
[69] *Ibid* at p27.

never to be achieved, as one would have to travel from the Labour Court to the LAC, the SCA and thereafter the Constitutional Court.[70]

The above confused state of affairs was resolved by the amendment of the Constitution which provided that the appeal relative to the decision of the Labour Appeal Court shall only lie with the Constitutional Court and no longer the Supreme Court of Appeal. What has not as yet been properly dealt with is the fact that the Labour Relations Act still provides that the High Court shall have concurrent jurisdiction with the Labour Court relative to labour disputes in which litigants raise constitutional issues. Van Eck in this regard has proposed an amendment to the current LRA to cater for this defect.[71]

The involvement of legal representation in courts plays a vital role as their expertise also hones the clarity needed in the interpretation and application of the law. The structure of the CCMA awards will be tested against the existing judgments as the system ordinarily employs the principle of *stare decisis*. Although the CCMA is flexible, the labour courts are directed by previous authorities in interpreting awards. The fact that the Labour Court can in terms of section 158(2)[72] of the Labour Relations Act, after setting aside a review, can decide the dispute between the parties, allows for the involvement of legal representatives in matters in which ordinarily they may have been excluded at arbitration proceedings.

7. Conclusion

The features intended to be attained by having a specialised tribunal are commendable, and it cannot be gainsaid that their importance is profound. The system could even perform positively if the legislator can ensure that the process is streamlined to avoid

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[70] In the words of Van Eck and Mothiba at 31, see note 36 "the imperatives sought to be attained in terms of LRA, namely that of establishing expeditious and affordable labour courts with the necessary exclusive jurisdiction to develop a coherent body of jurisprudence had to be weighed against constitutional imperative of having one logical channel of courts flowing from the Small Claims Court, Magistrate Court, High Courts (and specialist tribunals and courts of equal status) to the penultimate Supreme Court of Appeal and the Highest Constitutional Court".

[71] See note 37 at 877.

[72] Section 158(2) provides that "if it is expedient to do so, continue with the proceedings in which case the Court may only make an order that the commissioner or arbitrator would have been entitled to make".

possible forum shopping between the labour courts and the High Court. If this confusion is not arrested, the important feature of the speedy resolution of disputes and the creation of expertise which should characterise the specialised tribunal will fizzle out.

The practice of requiring judges to undergo special training could also work well in improving the relevant expertise required to be harnessed in the labour court systems. The relevant expertise will also assist in ensuring the speedy resolution of disputes. The court of first instance will be able to analyse disputes presented and will be able to deliver well-reasoned judgments which the higher court will readily agree with. Waglay[73] noted in this regard that expertise could guarantee both an expeditious and efficient dispute resolution process. He stated that "the establishment of the Labour Court and LAC in 1995 was also inspired by the hope that, being staffed by specialist judges, they would deal with matters within their jurisdiction expeditiously and efficiently. Justice delayed is justice denied."[74]

The managing of legal costs by restricting legal representation at the lower stage of the adjudication process is important, but this should not compromise the administration of justice. It is suggested that legal practitioners should be allowed on the basis of a contingency fee arrangement and, where it is warranted, an appropriate order for costs against the employer would ameliorate the cost effect on employees.

[73] Waglay, "The Proposed Re-organisation of the labour Appeal Court" (2003) 24 *ILJ* 1223.
[74] *Ibid* at 1228.

CHAPTER 3

CHALLENGES FACED BY SPECIALISED DISPUTE RESOLUTION INSTITUTIONS

1. Introduction

The system of having specialised dispute resolution tribunals has not been without flaws and challenges. This chapter will identify these challenges and will further consider possible solutions to ensure that the ideals underpinning the establishment of specialised tribunals are achieved. The fact that legal representation is not allowed as a matter of course reduces the challenges already experienced. It should be noted that if these challenges are not properly dealt with, legal representation may be motivated as parties will find the process unfair.

2. Challenges Faced by the System

2.1. Expertise

The expeditious resolution of disputes is still being frustrated by the fact that litigants still have a choice of proceeding to the High Court and not the speciliased labour courts for the adjudication of disputes. This encourages forum shopping and further gives rise to a lack of expertise.[75]

2.2. Capacity of the Institutions

[75] Mathiba, LLM dissertation at 46.

Bhorat[76] *et al* observe that the CCMA has not been able to resolve disputes as expeditiously as it was anticipated. This was due to financial and human resources constraints.[77] This was also confirmed by Benjamin,[78] who states that "the number of referrals received by the CCMA exceeds the assumptions made during the establishment of the CCMA".[79] In view of the resource challenges, there is a compromise on the quality of work done by the commissioners and, as a result, justice cannot be guaranteed. To this end, Bhorat *et al* referred to Molahlehi J, who noted that in view of the pressure and work load the consequence could be that commissioners end up hastily "settling disputes and possibly also in superficial settlements which fail to address the underlying causes of conflict or the real needs of the parties".[80] A backlog is experienced despite the fact that legal practitioners have been barred from participating in CCMA proceedings. The superficial settlement of disputes ultimately does amount to a denial of justice.

Brand[81] has referred to the quality of settlement and opined that the commissioners have been encouraging settlement as a means of dealing with under-resourcing. The commissioner, therefore, will persuade employers to settle the matter to avoid the inconvenience and uncertainty of the process and at the same time persuading employees to trade off their right to have their day in court as the outcome is not guaranteed and they should, therefore, accept the guaranteed sum of money.[82] Brand further stated that this process raises a serious question about the quality of the real dispute resolution and at the end creates an unpalatable perception of the role and partiality of the conciliation process.[83] The kinds of settlement contrived under these circumstances are not respected by the parties thereto and they ultimately become reluctant to fulfil them. It should be noted that once there is no integrity in the settlements, the parties will in the long run challenge the decision and the element of finality will not

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[76] Bhorat *et al* (2007).

[77] Bhorat *et al* (2007) at p6. The projections were that the system will carry 30 000 referrals per year and unfortunately the number increased to between 120 000 and 130 000 per year during the period 2002; 2003, see Bhorat *et al* (2007) at p12.

[78] Benjamin (2009) *ILJ* at p26.

[79] *Ibid*, 28. Benjamin (2013) at p12.

[80] Bhorat *et al* (2007) at p7.

[81] Brand (2000) *ILJ* at p77.

[82] Ibid at p86.

[83] Ibid.

be achieved immediately. Had legal practitioners been allowed to settle, they would naturally insist on reaching enforceable and good settlements for the parties. The fact that legal practitioners were party to such settlement would in most instances guarantee finality.

Benjamin[84] states that the settlement of disputes is also being used by the CCMA as a measure of assessing the performance of the commissioners. The commissioner who has settled more matters stands a chance to be reappointed or his contract being extended, compared to a commissioner whose settlement performance is low. It, therefore, follows that commissioners will be more eager to settle matters not in the interests of the parties but for the purpose of ensuring that such commissioners are reappointed or their contract of employment is renewed. This clearly will often result in the subversion of justice to the litigants. Being encouraged to settle rather than referring matters to arbitration leads to "hasty settling of disputes and possibly superficial settlements which fail to address the underlying causes of conflict or real needs of the parties results in commissioners having too great an interest in the outcome of the conciliation process because their future prospects as commissioners may depend on the settlement rate they achieve".[85]

Benjamin notes that that CCMA subsequently has introduced a system of scrutinising the settlement agreements to assess whether they are "legible, clear, unambiguous, legal, enforceable and whether they settle a dispute".[86] Benjamin concluded that this new change, however, did not interrogate the merit of the settlement and as such the quality of those settlements, if any, is still found wanting.

Mathiba[87] opines that "the shortage of financial and human resources failed to match the exponential case growth that the commission experienced over the years and this in effect led to delays in the settlement of disputes". The objective of being expeditious has

[84] Benjamin ILO working paper 47 (2013) at p17.
[85] Ibid. "Thus, unassisted and inexperienced parties could be unduly pressured to settle."
[86] Ibid.
[87] Mathiba LL.M Dissertation (2012) at p72.

eventually been hampered by these shortcomings.[88] Mathiba further proposed in this regard that private dispute resolution mechanisms should be the recourse or the resort, and the CCMA should serve as a fall-back measure in case of need.[89] Private mechanisms, if not properly funded, may become more expensive to the ordinary employee, which process may not only deny the litigants cheaper and accessible dispute resolution systems, but may be tantamount to a denial of access to justice.

Van Niekerk J also considered challenges relative to the achievement of the ideals underpinning specialised tribunals, and noted that there were also challenges on the infrastructure front. There are not enough chambers to house the judges. Bosch[90] also comments that there is a need for more judges to be appointed, but at the same time there is also a dire need for more court rooms to be built.

The shortage of judges and the concomitant failure to deliver quick justice is exacerbated by the jurisdiction of the court being extended to cover new areas of dispute. To this end, Bosch referred to section 19 of the Employment Services Act[91] which gives the "labour court the jurisdiction to deal with applications to review the Registrar's decision to refuse or cancel an agency's registration".[92] Bosch further notes that the Basic Conditions of Employment Act[93] has also granted the Labour Court exclusive jurisdiction to grant civil relief arising from breaches of sections 33A, 43, 44, 46, 48, 90 and 92.[94]

The commissioners also need to attend intensive training.[95] In this regard it was stated that "experience and/training specifically in dispute resolution-university degrees and diplomas are not always sufficient equipment in taking on two furiously disputing parties ready to resort to industrial action".[96] It was further mentioned by Mischke that the

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[88] Ibid at p72.
[89] ibid.
[90] Bosch (2015), The Dispute Resolution Digest 34 at p37.
[91] Act 4 of 2014.
[92] Bosch (2015), The Dispute Resolution Digest 37. The Act further gives the Labour Court for all matters excluding the prosecution of criminal matters and also the jurisdiction to review any administrative action in terms of the Act.
[93] Act 75 of 1997.
[94] Bosch (2015), The Dispute Resolution Digest 34 at p37.
[95] As will be shown in chapter 5 below, the UK tribunals are being chaired by a legally-qualified person.
[96] Mischke (1996) CCL 101 at p102, see also Fernwick and Novitz at p286.

personnel should be well qualified and have the necessary knowledge of the legal framework within which the system operates.[97] Brand[98] referred to the ILO report, which also sketched a bleak picture of the quality of awards issued because of a lack of resources and consequent understaffing. The least qualified commissioners were allocated arbitration matters, the result being injustice being accorded to parties' disputes. Brand further notes that in view of this lack of expertise, there have been complaints about the quality of arbitration awards, lack of logic and unacceptable levels of spelling and grammatical errors.[99] At the time, the commissioners were only given two weeks' training. This appears to be the reason for the CCMA to have increased the training of commissioners from two weeks to one year. The expertise which could be shared with legal practitioners during this process may alleviate the effect of a lack of knowledge of the commissioners.

2.3. Speedy Resolution of Disputes

Van Niekerk J[100] remarks that the commissioners are failing in discharging their mandate to ensure that disputes are dealt with "fairly and quickly with the minimum of legal formalities".[101] In view of the lack of capacity, Van Niekerk J further observed that he "remain[s] mystified by commissioners who allow proceedings to ramble on, witness after witness, uphill and down dale, in the belief that the parties are entitled to have their dispute determined by this type of procedure".[102]

2.4. Effectiveness of the Court Orders and Awards

During the period before 2002, the successful party was to be able to enforce the award by first having to bring an application to the Labour Court to make it an order of court.[103] This process was changed in terms of the 2002 LRA amendments. Parties now may

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[97] Mischke (1996) CCL 101 at p102.
[98] Brand (2000) 21 *ILJ* 77 at p89.
[99] Ibid at p89.
[100] Van Niekerk (2015) 30 *ILJ* 837.
[101] ibid p845.
[102] Ibid.
[103] Brand (2000) *ILJ* at p94 also noted that this process was tedious since the ordinary worker would not readily launch an application to make the award an order of court. In addition making an award was discretionary and the Labour Court could refuse the award on the basis that the "commissioner may have failed to apply the rules of natural justice".

certify the award at the CCMA and thereafter proceed to the Labour Court for the writ to be issued. Although this was intended to reduce the process needed to be followed to enforce the award, Benjamin has observed that it has "become a bureaucratic quagmire of its own".[104] Although the Director of the CCMA is entitled to delegate the responsibility of certifying the award, the investigation conducted by Benjamin established that this process may take approximately seven months to complete. The situation becomes worse, and the party that has secured the certification would have to further proceed to the Labour Court for the issue of the warrant of execution. The courts have a backlog in this regard, and it was established that the party may wait for a further period of six months.[105] It is submitted that this long winding road is clearly tantamount to a travesty of justice.

As if the aforegoing is not enough, the employee would need the service of the sheriff of the court to serve the warrant. Since most of the employees are not legally represented,[106] the sheriff would ordinarily first require security from the indigent employees. The sheriff would thereafter proceed to make an inventory of the assets attached. It is generally only at this stage that the employer will frustrate the employees by commencing the process of rescission or review of the awards. In this regard, Benjamin opines that "there is no doubt that many employers use (and are advised to use) the institution of reviews as a strategy to delay the enforcement of arbitration awards against them".[107] The certified awards are also deemed to have the force of an order of the High Court and, as a result, the sheriff costs are on a higher scale. The requirement for "security for the sheriff's costs undermines the capacity of the CCMA as an institution to provide employees with access to swift and cheap justice".[108] As a recourse, Benjamin opines that the costs associated with the enforcement of the award should be absorbed by the CCMA, and in this regard an analogy was made of the regime in maintenance matters where the execution of the maintenance orders does not attract sheriff costs. This process of enforcement may also

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[104] Benjamin (2009) *ILJ* 26 at p43.
[105] Ibid at p44.
[106] Sheriff do not generally require security from practising attorneys.
[107] Benjamin (2009) *ILJ* p41.
[108] Ibid at 46. Together with all other factors referred to "massively undermines the capacity of the CCMA to deliver in its mandate on social justice and expeditious dispute resolution."

be undertaken by legal practitioners who can assist the employees on a contingency basis.

2.5. Systemic Constraints

Bhorat *et al* conducted an efficiency research of the CCMA by assessing the different stages of the dispute resolution process between 2001 and 2005, and established that the conciliation process gradually became a process which did not resolve disputes, having dropped from 53 per cent in 2001/2002 to 22 per cent in 2005/2006.[109] Van Niekerk J, in contrast, has conveyed his understanding that the "CCMA has over the years continued to maintain its impressive rate of settlement at conciliation phase".[110] In addition, those matters that were resolved at arbitration level declined from 36 to 31 per cent during the same time.[111]

Brand,[112] who examined the performance of the CCMA in its early stages, also confirmed that under-resourcing of the CCMA could ultimately frustrate the important ideals intended to be achieved. He further referred to an ILO report on arbitrations wherein it was mentioned that "the case load assumptions upon which the organisational framework of the CCMA were 'vastly' understated. It is a fact that the LRA was designed without proper regard to available resources and probable case load which lies at the heart of the CCMA's failings."[113]

The problem is exacerbated by the fact that there are no requirements to ensure that the application for reviews is assessed to avoid meritless applications being brought by employers solely aimed at delaying the giving into effect of the award. Some of the applications are not be pursued to finality. The situation is aggravated by the fact that parties may still appeal the decision of the Labour Court, and this will keep the enforcement in limbo until the finalisation of the appeal process.

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[109] Bhorat *et al* (2007) at p21.

[110] Van Niekerk (2015) *ILJ* at p843.

[111] Bhorat *et al* (2007) 22. The writers also considered others stages including pre-conciliation settlement, rescission, points *in limine* and con-arbitration stage the latter being stable.

[112] Brand (2000) *ILJ* 77.

[113] Ibid at 82.

It is noted that the award of costs against dismissed employees in relation to meritless claims may not be of value to the employers since such an employee may not have income or assets of value at the time of execution. This may therefore become a case where a legal practitioner may play a vital role: First, an employee's claims are generally on a contingency basis, in which case the practitioner would assess the merits of the case and preferably take cases that have merit. Second, where such practitioners argue cases without merits, there should ultimately be orders of costs to be made against the legal practitioners personally. This may dissuade legal practitioners from taking matters with the hope that the employers may easily give in and settle claims.

2.6. Legal Representation

Bhorat *et al*[114] note that the high presence of legal and procedural technicalities within the CCMA results in protracted arbitration processes, whereas where there are no legal representatives,[115] the proceedings are more efficient as there are no over-proceduralisation and no disputes on technicalities.[116]

The participation by legal practitioners frustrates the realisation of a rapid resolution of the dispute by, *inter alia,* taking every preliminary point at any possible stage; and the enrolling of matters without due regard to the availability of judges.[117] In this regard, Benjamin notes that the "the rationale for excluding legal representation is that it tilts the balance in favour of the party with greater resources (generally the employer) and the participation by lawyers results in cases becoming more technical, drawn out and expensive".[118] Brand notes that there could be a fallacy in this argument since in private arbitration it has been established that lawyers play a very positive role.[119] As alluded to, there would be points *in limine* which could be raised by employees and/or their trade

[114] Bhorat *et al.*

[115] Legal representation in the CCMA proceedings is discussed in greater detail in the next chapter.

[116] Bhorat *et al* (2007) at p48, Benjamin noted that the "available information indicates that the employer and employee parties are represented by lawyers in about 15% of dismissal arbitrations". Benjamin (2009) *ILJ* 35.

[117] Van Niekerk 2015, 837 at 842.

[118] Benjamin (2009) *ILJ* 26 at p35.

[119] Brand (2000) *ILJ* 77 at p95.

unions. The CCMA commissioners should easily be empowered to dismiss such points, and it should follow that even where there are legal practitioners, such technical arguments can be equally discouraged.

2.7. Referrals Lacking Merits

The challenges experienced at the CCMA referral stage, amongst others, include the fact that the referring parties are not encouraged to precisely detail the nature of the dispute, thus contributing to the delay. In addition, since the burden is on the employer to always prove both procedural and substantive fairness, the employees and their representatives will not hesitate to refer and place every issue in dispute. The benefits of legal representatives, as stated above, would be to bring forth cases with good prospects of success, failing which there should always be costs against the legal practitioners. The legal practitioners would also assist in framing their claims with the requisite detail, therefore also avoiding unwarranted delays.

2.8. Dysfunctional Internal Processes

Van Niekerk J observes that although it could be considered commendable that there has been an increase in people's awareness of their rights, hence there has been an increase in the number of referrals. This in fact is a reflection of the failure of internal procedures to resolve the disputes and, in this regard, Van Niekerk J states that "it suggests a dysfunctional industrial relations system in the work place".[120] Van Niekerk J opines that an order for costs could be implemented as a discouraging tool, but has noted that this has been resisted in some quarters as it would have the effect of dissuading those employees with genuine disputes from referring same for adjudication. The United Kingdom introduced tribunal fees to discourage the referral of meritless claims. However, the Supreme Court decided that such fees were unlawful and further that they discourage the referral of claims which have merits.[121]

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[120] Van Niekerk (2015) *ILJ* 843.

[121] Unison (No 2) v The Lord Chancellor 2017 UKSC 51. This is also dealt with in chapter 5 on comparative analysis.

The solution to the aforegoing problem may include charging referral fees; awarding costs against parties referring frivolous cases; allowing for greater legal representation; and introducing qualification criteria for referrals.[122] It has been noted by Leeds and Wocke that, although commissioners are entitled to order a party to pay costs where such a party has acted in a frivolous and vexatious manner and according to the requirements of law and fairness, most commissioners have been slow in making such awards.[123]

Other solutions include the vigorous screening of referrals and employing a con-arb process instead of separating the process. The introduction of vigorous screening was also previously confirmed by Brand who quoted an ILO report on arbitration which concluded that, unless proper screening is implemented, there would be the "real risk that the CCMA as a whole will be perceived as inadequate and incompetent".[124] The research by Brand established that this was not a preferred method as the commissioner who was involved in the conciliation did not appreciate the different roles and different procedures that needed to be followed. Further, that arbitration is an intense process which may not be necessary as the matter may be settled at conciliation stage.[125] The research has also established that the overall opinion was that a referral fee should not be charged, that cost awards should be encouraged and that legal representation should be introduced. The qualification criteria as alluded to in other countries was discouraged as they could be abused by employers.[126]

2.9. Reviews and Appeals

In view of the fact that arbitration is compulsory rather than voluntary, it follows that the award is more often imposed and likely to be challenged by the parties.[127] However, it has been noted that this problem was alleviated by the labour courts by fashioning the

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[122] Leeds and Wocke (2009) *SAJLR* 29. Pursuant to a comparative study, Leeds established that there are fees charged in Australia by the Australian Industrial Relations Committee and no fees in the UK to the Advisory, Conciliation and Arbitration Service or the Employment Tribunal and also in German system and the latter only until a ruling and there being charges on subsequent challenge of the ruling.

[123] Ibid 30.

[124] Brand (2000) *ILJ* at p83.

[125] Leeds et al (2009) at p35.

[126] Leeds et al (2009) at p37.

[127] Brand (2000) *ILJ* 90.

test to review statutory arbitration "which is significantly broader than the narrow test traditionally applied to private arbitration".[128] There being no right of appeal, the review process has been used by parties to attempt to challenge the decisions of the arbitrator. Be that as it may, it is rather apt to deny parties a right of appeal in private appeals where the parties themselves have opted to write out or waive their right to appeal in their arbitration agreement.[129]

The fact that awards cannot be appealed but only reviewed, whilst it is intended at ensuring quicker finality, it denies litigants the opportunities available to other litigants generally. It assumes the fact that the arbitrator is neither fallible nor perfect. Brand has argued that the ability to further refer a dispute to another adjudicator "is not only demanded by the dictates of fairness and legitimacy, but it will also enhance the quality and consistency of arbitration as a dispute resolution process".[130] This earns support for the argument that the principle of speedy resolution is tantamount to advancing expediency or convenience at the expense of justice. Brand stated in this regard that "in adjudication, a focus on speed at the expense of quality and process can have very serious consequences for both procedural and substantive justice".[131]

The litigants are entitled to appeal the decision of the Labour Court in instances where there is discontent with the outcome of the review application.[132] Benjamin states that the objective of refusing appeal for the purpose of a speedy resolution instead has contrary effects. The learned author referred to a judgment in *Helholdt v Nedbank*,[133] where it was stated that the test for the appeal is easier than the test for the review.[134] In addition to the speedy resolution, Benjamin notes that "a further benefit of an appeal jurisdiction is that it would give rise to a clearer body of precedent to guide arbitrators, as the court's

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[128] Ibid.
[129] Ibid 90.
[130] Mathiba LL.M Dissertation (2012) at p73.
[131] Brand (2000) *ILJ* p87.
[132] Section 66 of LRA.
[133] (2012) *ILJ* 1789 (LAC).
[134] The test for appeal is "whether the decision of the arbitrator is right" and for the review is "whether the arbitrator exercised his statutory discretion to evaluate the fairness of the employer's decision in a fair manner." See Van Graan LLM Dissertation (2014) at p38.

judgment would focus on the correctness of the arbitrator's decision rather than the manner in which it was made".[135] The process of building precedent is enhanced by hearing constructive arguments ordinarily presented by legal practitioners on behalf of both parties. This process would be made easier if legal practitioners are allowed at the CCMA where the foundation of the case commences.

3. Solutions

3.1. Education and Training

Leeds[136] alluded to the fact that education could be a solution for those who intend to refer disputes to the CCMA, particularly cases that are inherently frivolous. In all, the research by Leeds *et al* has established a preference for the screening of cases and the enforcement and encouragement of costs awards in frivolous cases and, finally, that commissioners should be empowered to dismiss matters even at the conciliation stage.[137] It is restated that the involvement of legal practitioners should help to ensure that claims are properly crafted and, hence, to avoid possible delays in finalising claims.

The amendment of the CCMA legislation, as suggested by Van Niekerk, is to require that the referring party should be required to provide the detailed and precise nature of the dispute. However, the author notes that this should not be detailed pleadings as would be required in a civil court.

3.2. Activism by Judges

The early intervention by judges will also reduce the time invested in attending to collateral issues which crops up late in the pleadings or when the judge receives the file which will be a day or two before the trial.[138] In addition, the process should not only be left to the whims of the legal practitioners. Continued and/or ongoing engagement between the role players, being both the CCMA and the Labour Court, is necessary "to ensure that the

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[135] Benjamin (2013) at p25.
[136] Leeds and Wocke (2009) SAJLR at p37.
[137] Ibid at p38.
[138] Van Niekerk (2015) 30 *ILJ* 846 at p847.

dispute resolution process is properly streamlined and that the statutory purpose of the efficient, expeditious and inexpensive resolution of labour disputes is met".[139]

The judges will also clamp down on the *laissez-faire* attitude of litigants who delay in challenging reviews with the hope that condonation will readily be granted. Any delay in the finalisation of the matter frustrates the purpose and object of attaining an effective and expeditious resolution of labour disputes. This was also emphasised in *Makuse v Commission for Conciliation, Mediation and Arbitration and Others*,[140] where the court decided that without providing compelling arguments in the application for condonation, courts should not grant condonation despite the fact that there could be good merit in the review application.

3.3. Protracted and Burdensome Process

Benjamin has identified as a solution to the protracted process of enforcing awards, coupled with the dependency of the CCMA on other institutions, that the Rules Board should convene and promulgate rules that will ensure that employees are not frustrated. There should also be a budget housed elsewhere to ensure that employees are not frustrated by having to raise funds for security for sheriff's costs. Further, there should be an inter-agency committee established to oversee the enforcement process.[141] Benjamin[142] also notes in the ILO report that frustrated employees end up having to abandon their claims, alternatively having to settle for compensation on terms that are not favourable. Employees at times are also compelled to share their compensation with attorneys who will deduct a percentage from the proceeds of an auction or from the funds collected in the event of employees engaging attorneys to assist in the execution of the writs.

The proposition by Benjamin has merit, but as alternative the fact that a legal practitioner can absorb the costs could be also a solution. This will reduce the burden on the fiscus

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[139] Ibid at p847.
[140] (JR2795/11) [2015]ZALCJHB 265, [2015] 12 BLLR 1216 (LC).
[141] Benjamin (2009) *ILJ* at p48.
[142] Benjamin (2013) at p25.

to provide funding for poor litigants who seek to enforce orders. It will also assist with costs associated with the transcription of records for review purposes. The rules may have to make provision that in the event where the litigant shares the compensation with legal practitioners as a result of a contingency fee arrangement, such fees must be recouped from intransigent employers who may have put up a fight only to frustrate the finalisation of the dispute.

4. Conclusion

The exposition above details the challenges encountered in giving effect to the principles engendered by the establishment of the specialised tribunals, and also demonstrates that such institutions have not become irrelevant. The suggested solutions, if heeded, could culminate in the improvement of the service provided by the CCMA specifically and also all other role players.

One of the positive factors which has led to the swift resolution of disputes was the amendment in 2002 where the con-arb was introduced. Ordinarily, matters referred to the CCMA will first be referred to conciliation and in the event that the dispute is not conciliated, the dispute will then be referred for arbitration. In terms of the system of con-arb, the parties will be able to continue with the arbitration immediately after the matter could not be successfully conciliated. Benjamin,[143] who assessed the settlement rate, confirmed that most matters that go to con-arb have a higher settlement rate in contrast to matters where one of the parties objected to the con-arb. It must be noted that this process will be undertaken provided that the other litigant has not objected to the con-arb. It has been established that in the majority of cases, the employer party is the one objecting.[144] It follows that the party who objects to this process comes to the tribunal with the malicious motive of ensuring that the resolution of disputes takes as much time as possible. Statistics of matters that came before the CCMA and where the parties have agreed to the con-arb, a sizable proportion, "are resolved at the first hearing either by settlement or by arbitration".[145]

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[143] Benjamin, ILO Working Paper (2013) at p16.
[144] Benjamin (2009) *ILJ* at p32.
[145] Benjamin (2009) *ILJ* at p33.

The legal practitioners would assist in properly detailing the nature of the claim, serving as security for costs relative to executing judgments and also settling costs associated with transcription. The system will have also benefit from costs *de bonis propriis* in instances where meritless claims are being lodged by the legal practitioners.

CHAPTER 4

LEGAL REPRESENTATION BEFORE DISPUTE RESOLUTION INSTITUTIONS

1. Introduction

As evinced in *CCMA and Others v Law Society of the Northern Province*[146] (*Law Society* SCA judgment), the conundrum regarding the existence of the right to legal representation of employees before the CCMA has not been solved in the South African judicial system. Even though this issue appears to have been resolved, this dissertation seeks to reopen the debate. To this end, this chapter provides a brief background to the discourse regarding legal representation before the CCMA, and further sets out to explore the extent to which the limitation on the right impacts on the dispute resolution system in South Africa.

The South African Constitution enjoins the judiciary to embark on transformative justice[147] and, as such, this chapter will also investigate the socio-economic status of litigants and assess the extent to which such statuses may affect access to justice.

2. Historical context

2.1. Common-law position

[146] (2013) 34 *ILJ* 2779 SCA.
[147] Dugard (2008) 14 *SAJHR* at 215.

Generally, parties to a dispute are entitled to be dealt with fairly, and this includes the right to be given a fair opportunity to present one's case. The right to legal representation, however, has never been extended to administrative tribunals.[148] Notwithstanding the foregoing, a tribunal has a discretion to allow legal representation in appropriate cases, "where the dispute is complex or where it raises complex matters of law, each case being dealt with on its particular merits".[149] Berman J considered that in exercising a discretion to allow representation, one has to consider factors such as the standard of education of the employee and his fluency in English.[150]

2.2. Statutory position

The common law position as set out above was codified in South Africa through the promulgation of the Industrial Conciliation Act[151] which provided in section 45(12):[152]

> Any party to the dispute shall be entitled –
> (a) ...
> (b) If all the parties to the dispute consent, to be represented at those proceedings by one or more legal practitioners or by one or more members, office-bearers or officials of any trade union or employers' organisation which is not a party to the dispute.

Such a provision was also included in the 1956 Labour Relations Act[153] (1956 LRA Act) in section 45(9)(c) which provided:

> Any party to the dispute shall be entitled;
>
> (a) ...
> (b) ...
> (c) ...if all parties to the dispute consent, to be represented at those proceedings by one or more legal practitioners and any party which is represented in any manner referred to in para (c) or which has consented

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[148] See *Morali v President of the Industrial Court and Others* 1987 *ILJ* 130 (IC), at 133B where it was decided that the tribunal has the discretion to permit representation.

[149] See *Morali* at 133 (D).

[150] *Ibid,* at 133E. Berman further stated that the "legislature ... was dealing with the resolution of disputes between masters and servants, where cases might well arise where ignorant, illiterate and inarticulate servants and their conglomerate, multi-multinational masters fall out and one of the former might find himself opposed by an experienced legally trained and qualified in-house counsel before the industrial court, a David without his slingshot against a well-armed Goliath."

[151] Act 36 of 1937.

[152] Read with section 46(6).

[153] Act 28 of 1956.

> to any party being represented in such manner, shall be deemed to have consented to every other party being represented in the same manner.

The question whether legal representation could be allowed at the discretion of the presiding officer in the Industrial Court was answered based on the provisions of section 45 of the 1956 LRA. The court per Berman J[154] concluded that this section of the LRA of 1956 did not impliedly or explicitly deprive the presiding officer from exercising the discretion to decide on the question of whether legal representation should or should not be allowed.

3. Current legal framework

3.1. Labour Relations Act 1995

A similar position[155] was provided for in terms of section 140 (1) of the Labour Relations Act[156] which provided:

> If a 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 and capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless –
> (a) the commissioner and all the parties consent; or
> (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
> (i) the nature of the question of law raised by the dispute;
> (ii) the complexity of the dispute;
> (iii) the public interest; and
> (iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute.

A legal representative as envisaged in this provision refers to any person admitted to practice as an advocate or attorney in the Republic of South Africa.[157] It was observed by

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[154] *Morali* at 134 G.

[155] Notwithstanding that the restrictions was with our statutes as early as 1936, the legislators gave motivation for limiting legal representation on the basis that "lawyers are often responsible for delaying disputes and lawyers make settlement of dispute of this nature more expensive". Joubert, LAWSA at 548, par 908.

[156] Act 66 of 1995 (LRA). Except that in contrast to the previous legal position there was no distinction between dismissal for misconduct and incapacity on the one hand versus operational requirements on the other.

[157] *Ibid* section 213.

Van Niekerk *et al*[158] that consultants,[159] candidate attorneys, paralegal officers, officials of unregistered trade unions and employers' organisations do not qualify as legal practitioners. The above provision was subsequently amended as set out below.

3.2. Amendment in 2002

The LRA was amended through the introduction of section 28 of the Labour Relations Amendment Act.[160] This section accorded the CCMA with powers to pass regulations dealing with the issue of legal representation before its proceedings. In this regard, the CCMA promulgated Rule 25[161] of the CCMA Rules which provides as folllows:

> Representation before the Commission -
> (a) in a 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 employer's organisation.
> (b) in any arbitration proceedings, a party to the dispute may appear in person or 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 employer's organisation.
> (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 subrule1(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 and 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."

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[158] Van Niekerk *et al*, Law@Work (2015) 3rd Edition, at p456.

[159] It was stated in *SOM Garmets (Pty) Ltd v Van Dokkum* [1997] 9 BLLR 1234 (LC) that labour consultants may not be allowed to appear on behalf of parties before arbitration.

[160] Act 12 of 2002.

[161] Promulgated in terms of section 115(2A), see GN R961/GG23611 OF 25 July 2002.

The rule[162] went further to state that in the event a dispute is raised or the commissioner suspects that a representative does not qualify in terms of the rule, the commissioner must determine the issue.

The discretion in permitting legal representation should be exercised judicially, taking into account factors as stated in section 140(1)(b)(i)-(iv).[163] In addition, once the commissioner has decided that the employee is entitled to legal representation, such a commissioner will not without justification exercise his discretion to withdraw such a right.[164] Where all parties have agreed to legal representation, one of the parties may not also without proper justification depart from such an agreement.[165] Notwithstanding the foregoing, the commissioner retains the discretion to disallow legal representation even where all other parties have consented thereto. Du Toit *et al* observe that "this follows from the fact that the commissioner should in overall control the process".[166]

The motivation for the restriction on legal representation, which may be gleaned from different authors as stated below, is illustrated in the Explanatory Memorandum to the Draft Labour Relations Bill 1995[167] where it was stated:

> Our system of adjudicating unfair dismissal disputes is contrary to its original intentions, highly legalistic and expensive. The industrial court conducts its proceedings in a formal manner, along the lines of a court of law, and adopts a strictly adversarial approach to the hearing of cases. Judgments are lengthy, fairness is determined by reference to established legal principles and within an essentially adversarial system, the lawyer's presentation of a case has inevitably emphasised legal precedent. Legalism undermines the goals of the system, namely cheapness, speed, accessibility and informality.

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[162] Rule 25(2).

[163] Joubert, *The LAWSA*, second edition, volume 13 part 1 at p549. See also *Coyler v Essack* [1997] *ILJ* 1381 (LC) at p1384 E-F.

[164] *Coyler* at 1384 G-J.

[165] *Mthembu & Mahomed Attorneys v Commission for Conciliation and Arbitration and Others* (1998) 19 *ILJ* 144 (LC) at 146 B.

[166] Du Toit *et al* (2011), at p151.

[167] See Mathiba LLM Dissertation: Mathiba, 2012, at p4.

Grogan[168] observes that the exclusion of lawyers is predicated on the following assumptions: First, that there is something to distinguish dismissals for misconduct or incapacity, on the one hand, from other disputes over which the CCMA has jurisdiction (such as unfair labour practice, constructive dismissals, disputes arising from collective agreements and the like) which warrants exclusion of lawyers from the former, but not the latter. The Labour Appeal Court reasoned that the exclusion of other matters was premised on the fact that "they make up by far the majority of matters which come before the CCMA, and therefore made perfect sense to single them out for special treatment".[169] In contrast, the CCMA argued[170] "that the distinction is justified by the fact that disputes concerning dismissals for misconduct or incapacity are less serious, are regulated by a detailed Code of Good Practice, that they should be resolved swiftly and with a minimum of legal formalities and that the system worked to the satisfaction [171] of the social partners who devised and now used the LRA". The statement that the matters are less serious fails to appreciate the consequences of dismissals of the employee and his family.

Second, the presence of lawyers somehow complicates matters and generates the legal technicalities commissioners are enjoined to avoid. It would be apt to craft a system which will help avoid technicalities easily.[172]

Third, commissioners can on the basis of vague criteria discern in advance whether a particular matter justifies legal representation.[173]

Fourth, the presence of lawyers inevitably complicates matters and hinders swift and effective resolution.[174]

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[168] Grogan, "No obfuscation, please: Legal representation in the CCMA" (2013) *"Employment Law"* 14.
[169] *Ibid* Grogan (2013) at p15.
[170] Noted by Grogan from the judgment of *Law Society of the Northern Provinces v Minister of Labour and Others* [2013] 1 BLLR 105 (GNP).
[171] Grogan (2013) at p15.
[172] Ibid.
[173] Ibid.
[174] Ibid.

4. The Nature of the Proceedings

The question requiring attention is whether the process is inquisitorial or accusatorial. The LRA provides in section 138:

> The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum legal formalities.

Notwithstanding the foregoing, "ordinarily it was found that there will be no legal representation and it will be appropriate for the commissioner to conduct proceedings in the same informal manner as in the Small Claims Court".[175] It has, however, been emphasised that the commissioner may be inquisitorial in approach but should be wary of creating an impression of bias in the process.[176]

Despite this, the simplicity in the procedure to attain a speedier resolution of disputes outlined below demonstrates that in certain instances the process as outlined above may militate against the attainment of justice.

4.1. Legal Representation

One of the criticisms of the limitation to legal representation is the fact that it becomes an unfair process to employees as employers would ordinarily have resources which employees will not match or readily acquire.[177] Dugard[178] examined the structural poverty of South Africa post-democracy and concluded that there had not been any improvement

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[175] *Labour Law Through cases*, LexisNexis, service issue 5, May 2005, at LRA 7-39.

[176] In *Mutual and Federal Insurance Co. Ltd v The Commission for Mediation and Conciliation and Arbitration and Others* [1997]12 *BLLR* 1610 (LC), it was stated that bias does not only mean proven bias, conduct by the commissioner "which goes towards creating an suspicion and perception of bias which may might be entertained by a lay litigant" also provides grounds for review. Stelzner AJ in *County Fair Foods (Pty) Ltd v Theron NO & Others* [2001] 2 BLLR 134 (LC) at par 11 stated that "bias will be held to exist not only where reasonable people might form the impression of bias". Ibid at LRA 7-41. Brassey *et al: Commentary on the Labour Relations Act* at A7:49: "In adversarial proceedings the litigation process is in the control of parties; the evidence that is adduced is that which the parties choose to present and the arbitrator plays a more active role in the hearing, calling witnesses and interrogating them in order to ascertain the truth ... Where an arbitrator adopts an inquisitorial approach to the arbitration, she cannot abandon the well-established rules of natural justice; on the contrary, she must be especially careful to guard against creating a suspicion of bias in the breast of litigants who will have little, if any, experience of a process so foreign to our system of adjudication." LRA 7-39.

[177] Benjamin (2009) at p35.

[178] Dugard, *Constitutionalism of the Global South - Courts and Structural Poverty in South Africa* (2014). The article by Dugard focuses primarily on access to ordinary courts and has been referred to in this chapter to the extent that same is relevant to other fora envisaged by the Constitution of South Africa.

in the livelihood of the poor members of community. The status of poverty, therefore, would impact on the ability to access the relevant fora with a clear understanding of the applicable principles to be dealt with at adjudication fora. Access to justice relates not only to "physical access to courts but incorporates the ability to effectively be heard and responded to".[179] In South Africa, this right to access is impacted by structural poverty. Dugard concludes that "the courts should therefore have regard to the effect of poverty and approach the application of the law and embrace a more substantively pro-poor role ... and this will contribute not only to material change and socio-economic justice, but also to the consolidation of democracy in South Africa".[180]

In contrast to the argument that the presence of lawyers is frustrating and dilatory, it was noted by Brand[181] that there is a fallacy in such an argument since it was established that in private arbitration, the role played by legal representatives was more positive and not dilatory and frustrating.

Since the motivation is also to minimise costs, which opens the gate for the referral of frivolous cases, an order of costs could readily be made against the representative who delays and/or refers unwarranted matters through this process. The rules governing civil process that provide for orders of legal costs *de bonis propriis* should be incorporated and applied. Van Niekerk has suggested that costs orders could be used to discourage unmerited referrals.[182]

4.2. Proficiency and Literacy of Trade Unions

The trend has been to appoint shop stewards in an employment setup to represent employees. The election of the shop stewards ordinarily would not depend on the

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[179] Dugard at p304.

[180] At p304. Budlender stated in *Nkuzi* case that "to assert that such people have access to court is simply to assert legal fiction". He further stated that a litigant to effectively be able to present his case should "have a knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court, must have some knowledge about what to do in order to achieve access, and must have the necessary skills to be able to initiate the case and present it to court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts."

[181] Brand at p95.

[182] Van Niekerk at p843.

educational level of such a member, and in practice shop stewards would be preferred for appointment by employees on the basis of such an employee being vocal. Shop stewards in these instances may frustrate the attainment of justice. It was observed, though in a disciplinary context, in *NUM and Another v Blinkpan Colliers Ltd*[183] that "proper representation does not mean the mere physical presence of another. A representative should at least be able to assist an alleged offender in the preparation and presentation of his case, especially so in the case of an illiterate and uneducated worker."

Being restricted to be represented by a union representative, alternatively a co-worker who may also be illiterate, may *ipso facto* be tantamount to denying one access to justice. Whereas members of unions are entitled to be represented by anyone of their choice, employees who are not members of a union are left out to fend for themselves.

Buchner[184] notes with approval that a right to legal representation today is generally regarded as a necessity and not as a privilege, as was emphasised in the Hoexter Commission of Inquiry into the structure and functioning of the courts.[185] The writer further notes that the CCMA is not an ordinary administrative tribunal and that it has other powers.[186] He further observed that the powers of the commissioner put him in a position to level the playing fields in relation to the fact that employers may be even more powerful where they are represented.[187]

In *Lace v Diack*,[188] the court per Buchner J stated that it would be fair where the employee faces a serious sanction such as dismissal that he must be allowed a representative of his choice.[189] The court did note the fact that there was no absolute right to legal representation. It was mentioned in the Appellate Division that where one is facing a

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[183] (1986) 7 *ILJ* 579 (IC).
[184] Buchner, LL.M Thesis, 2003.
[185] Ibid at p5.
[186] Ibid at p7.
[187] Ibid at p7. See further motivation for exclusion as stated in the explanatory memorandum at p8.
[188] 1995(3) SA 769 (N).
[189] At p26.

charge of fraud, legal representation becomes necessary, although this was not followed in the *Lace* case.[190]

Buchner, who argues in favour of legal representation, includes the difference between protagonists: an ignorant, illiterate and inarticulate affected person against a well-trained, experienced and competent in-house specialist, or a situation where the applicant is a foreigner with no knowledge of local legal proceedings.[191]

4.3. Law Society Judgment

The Law Society of the Northern Province decided in the interests of the attorneys as its members to present an argument that the limitation on the right to legal representation before the CCMA

> unfairly discriminated against legal practitioners in violation of section 9(3) of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act[192] that it infringed section 22 of the Constitution which guarantees every person the right to choose his or her trade, occupation and profession freely and that the exclusion of legal representation infringed section 34 of the Constitution which ensures that every person has the right to have any dispute that can be resolved by the application of law resolved in a fair public hearing before a court or another independent and impartial tribunal or forum.[193]

The case was first argued before the Gauteng High Court, and the judge decided that the CCMA was a body that makes administrative decisions and that such decisions have to comply with the provisions of the Promotion of Administrative Justice Act (PAJA).[194] In this regard, section 3(3)(a) of the PAJA provides that an administrator should have a discretion to allow legal representation in serious and complex administrative proceedings[195] and, since the commissioner is only allowed to consider complexity, Rule 25(1)(c) fell short of the standards set by section 3 of PAJA. The judge further stated that

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[190] Ibid, see p27, see note 89.

[191] see p39.

[192] Act 4 of 2000.

[193] The *Law Society* SCA judgment, see par 2.

[194] Act 3 of 2000.

[195] Having noted that the Constitutional Court has decided that the CCMA is not a court of law and therefore Commissions decision amounted to administrative action. See *Sedzumo v Rustenburg Platinum Mine* (2007) 12 BLLR 1097.

the rule was also liable to be set aside on the basis of irrationality since the decision that the rule should only apply to misconduct and capacity case was arbitrary.[196]

The Supreme Court of Appeal, per Malan J, decided that the judge had misdirected himself and decided a case that was not presented and/or argued before him. The Court noted that PAJA was not applicable to CCMA cases, and to this end Malan J stated that the Constitutional Court held that PAJA did not apply to the review of CCMA arbitrations.[197]

The SCA importantly noted that the purpose of the action was only self-serving on the part of the Law Society and failed to appreciate the fact that a right to legal representation exists for the benefit and protection of litigants.[198] The Court further stated that the rule did not impact on the regulation on entry to the profession for lawyers or the continued choice to remain practitioners.[199]

The argument regarding section 34 also failed as the Court confirmed the legal position that "there is no unqualified constitutional right to legal representation before administrative tribunals".[200] The discrimination argument also did not succeed as the Law Society had failed to demonstrate that its members "were denied recognition of their inherent dignity by the sub-rule nor that the alleged discrimination relates to one or more of the listed grounds listed in chapter 2 of the Equality Act".[201] It was further noted that "the jurisprudence of the Constitutional Court amply demonstrates that infringements of equality rights are inextricably linked to infringements of dignity and there are none in this case".[202] The SCA therefore upheld the appeal and dismissed the decision by the Gauteng High Court.

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[196] The *Law Society SCA Judgment* at par 6.
[197] Ibid at par 20.
[198] Ibid at par 18.
[199] Ibid at par 25.
[200] Ibid at par 26.
[201] Ibid at par 24.
[202] Ibid at par 24.

The Law Society brought an application for leave to appeal before the Constitutional Court, but the appeal was dismissed as there was no prospect of success. The Constitutional Court, however, did state that the limitation to legal representation before the CCMA had not been established in our legal system.

5. Conclusion

The *raison d'être* for the establishment of the CCMA and restriction of legal representation can be traced back to the early 1920s and legislation promulgated in subsequent years. The distinctions in the 1937 and 1956 LRA in contrast to the 1995 LRA is that previously the arbitrator was not clothed with the discretion whether or not to permit legal representation, but would be bound to permit legal representation as along as the parties have consented thereto.

Another contrast is the fact that in the regime of the time there was no distinction between the nature of the basis for dismissal. Currently the right to legal representation is restricted and exercisable on the whims of the arbitrator (alternatively when all parties agree thereto) only in respect of dismissals based on misconduct and incapacity.

This regime indeed has a greater positive consequence on the adjudication process of disputes before the CCMA. However, there are some aspects which may require further attention. In this regard, an employee who is not a member of a union is left to fend for himself or herself or to be represented by a co-worker who may not be as informed as a union representative. The situation may be aggravated by the fact that in view of the previous dispensation and structural inequality, those previously disadvantaged may therefore be worse off.

The attempt by the Law Society of the Northern Province demonstrated that the battle on the unqualified right to legal representation has been decided and a further attempt at challenging it will not be sustainable. The framing thereof was indirectly an admission that all had been exhausted regarding a claim which can be argued for the employee, hence the attempt to base a claim on the basis of the interests of the members of the legal profession.

Therefore, the dissertation argues that the policy makers should reconsider the current position. It is submitted that the position should be changed and legal representation should be allowed provided that the process is streamlined to avoid the possibility of raising technicalities. In addition, legal representatives should personally take the blame and be ordered to pay costs from their own pockets where a claim referred to the CCMA is found to be frivolous. Finally, the rules should ensure that all legal costs should be paid by the employer in instances where the employer unnecessarily frustrates the implementation of the award or court order.

CHAPTER 5

COMPARATIVE STUDY

1. Introduction

There are divergent reasons in various countries for the establishment of labour dispute resolution institutions. In addition, different countries also have distinct approaches and motivations on whether legal representation should be allowed in their respective labour dispute resolution institutions, while others may provide a variety of limitations and/or restrictions on legal representation. This chapter will outline a comparative position of different jurisdictions[203] on the reasons for the establishment of labour dispute resolution institutions and the structures of such institutions. The challenges experienced by these institutions will where possible be identified and thereafter possible solutions thereto will be outlined.

2. International Instruments

Most growing economies in the world defer to the wealth of experience of the International Labour Organisation (ILO) to craft their labour regimes aimed at attaining social peace, *inter alia*, in the labour environment. That notwithstanding it is noted that the crafting of different labour regimes has to take cognisance of the socio-economic, political and cultural environment of each country or state.

[203] The European Union position will also be outlined.

Servais[204] refers to article 8 of the ILO Convention which provides that "disputes should be settled through negotiation, or through independent and impartial machinery such as mediation, conciliation and arbitration and to be established in such a manner as to ensure the confidence of the parties involved".[205] The Convention articulates the important attributes to the resolution process being easy access; independence; impartiality; and expeditious and free of charge with an element of finality attached to arbitration.[206] The essence of this Convention has been domesticated in South Africa.[207] These attributes appears to have been shared by different countries in addition to EU countries.

Article 6(1) of the European Convention on Human Rights provides that "in the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent impartial tribunal established by law".

3. United Kingdom

3.1. Legal Regime

Van Eck[208] traced the history of the establishment of employment tribunals in the United Kingdom from the 1960s. The Industrial Tribunal was established in 1964 through the Industrial Training Act. This institution was renamed the Employment Tribunal in terms of the Employments Rights Act of 1999.[209] This Act deals with collective bargaining and the process of conducting disciplinary hearings and the regulation of dispute settlement

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[204] Servais, "The ILO and the Freedom to Strike". https//www.scribd.com/document/18575437/Services-The ILO-and –the0freedom-to-strike, accessed on 13 October 2014. Servais examined the right to strike within the purview of ILO standards on alternative methods to settle disputes discussed the Convention No. 151 (Convention on Labour Relations on the public service).

[205] Servais at p8.

[206] Ibid p9.

[207] This position is buttressed by the section 3 (c) of the Labour Relations Act (LRA) which enjoins South Africans to have regard and ensure compliance with its public international obligations in the interpretation and application of the LRA.

[208] Van Eck "Representation During Arbitration Hearings: Spotlight of Bargaining Councils" *TSAR* 2012-4 at p774.

[209] Ibid at p777.

procedures. Currently, the Employment Act of 2008 expounds on the dispute resolution and disciplinary procedure tribunal.[210] The disputes referred to the tribunal will be handled by a body referred to as the Advisory, Conciliation and Arbitration Services (ACAS).[211] This institution is chaired by a judge who is assisted by two members, one with expertise as an employer and the other with experience in representing employees.[212] The dispute will be dealt with at conciliation, failing the resolution the hearing of the full Employment Tribunal. The UK position appears to have downplayed the argument that legal formalism may frustrate quicker justice by appointing a judge as the person presiding.

3.2. Legal Representation

Legal representation, as in South Africa, previously was not recognised. This position was expounded by Torul,[213] who referred to Lord Denning,[214] who noted that that since the pronouncement in 1929 when Maugham J[215] expressed the view that legal representatives have no right of audience "much water has passed under the bridge". The judge added that the limitation at that time may have been meant for minor matters where the rules may properly exclude legal representation. Lord Denning concluded that in tribunals seized "with matters which affect a man's reputation or livelihood or any matters of serious import" natural justice may demand that such a person be defended by a solicitor if he so wishes.[216]

3.3. Challenges and Solutions

As is the position in South Africa, conciliation is not compulsory and, as such, more often the parties – usually the employer – would not attend the conciliation procedure. For the

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[210] Mphahlele at p44.

[211] Ibid at p46

[212] See Van Eck, 2012 *TSAR* at 777. See also LLM Dissertation, WK Mphahlele, UP. (The Labour Relations Disputes Resolutions System: Is it Effective?).

[213] Torul V.P., "The Mauritian Law of Procedural Fairness within the Context of Dismissal for Misconduct: A Comparative study with the South African Doctrine of Unfair Labour Practice.

[214] *Pett v Greyhound Racing Association* (1968) 2 ALLER 545 at 549(CA) as quoted Torul by at p186.

[215] In *McClean v Workers' Union* (1929) ALLER 468 at p471.

[216] Torul at 187, having referred to *Nitya Ranjan v State the Orissa* High Court, AIR 1962 Ori 78 (D.B) at 81. Torul also referred to *Carr v Federal Trade Commission* 302F, 2nd 688 at 688-690 (1962) where the position in the United States of America per Aldrich J said of an unrepresented person that "he introduced no evidence, except to make a formal statement which unfortunately, we find far from clear. This perhaps illustrates the fact that a party who tries his own case is like a man cutting his own hair – in a poor position to appraise what he is doing."

purposes of dissuading the parties to attend, the tribunal is empowered to punish the absent party by increasing an award up to 25 per cent against the employer who fails to attend, alternatively by decreasing the award by the same margin against the employee who fails to attend the conciliation.[217]

It has also been noted that some claims referred for adjudication are without merit. Some disputants would easily refer the matter and the employers would opt for settlement to avoid having to apply their resources to defending such claims. The UK introduced tribunal fees which generally discouraged the referral of claims.[218] Although this process was commended, it transpired that its unintended consequence included discouraging disputants from referring their meritorious claims as the fees may exceed the total claim lodged, and to some extent this restricted access to justice.

This regime was challenged by *Unison*[219] challenging the free structure, "arguing that it unlawfully restricted individuals' legal right to access to justice". The Supreme Court decided that the structure was unlawful and discriminatory, and further that this was also inconsistent with the ILO position that access to tribunals should be free.

It appears that the motive to introduce fees was noble but due to the unexpected consequence of discouraging meritorious claims, it has been set aside. However, an effort should be made to have ways of discouraging unmeritorious claims and this may include the "development of a full compulsory conciliation service".[220]

4. **Swaziland**

4.1. Legislative Framework

[217] Mphahlele at 47. This practice of encouraging and compelling attendance to conciliation has been adopted in Swaziland, see LLM Dissertation BS Dlamini UCT.

[218] "This regime was aimed at reducing the number of 'nuisance' claims being brought by opportunist workers." See www.lexology.com/library/detail.aspx, accessed on 24 September 2017, article by Taylor Wessing.

[219] *R (on the application Unison) v Lord Chancellor* 2017 UKSC 51.

[220] *Primans Law "Lexology"* 14 September 2017 accessed on 24 September 2017.

The Swaziland government has established the Conciliation, Mediation and Arbitration Commission (CMAC).[221] Section 76 of the Industrial Relations Act[222] (IRA) prescribes that the referral of disputes must be made within six months, failing which the litigant will be barred from lodging a claim. The Act does, however, provide for condonation. This prolonged period has the propensity to leave both the employer and the employee in limbo as both parties would generally wish for a speedy resolution of the impasse.

4.2. Legal representation

Section 76(1) of IRA specifically makes mention of the fact that the reporting of a dispute to the Commission can *only* be made by those specified in the said section. Those listed are an employee; an employer; an organisation which has been recognised in accordance with section 42; a member of a works council; a member of a Joint Negotiation Council; and any other organisation concerned in the dispute and active in the undertaking where no organisation has been recognised in terms of section 42. What it is clear from this section is that amongst those who can report a dispute, a legal representative is not included. Section 85(1), however, provides that a party may be represented by another person in conciliation proceedings if the disputants so agree.

The reporting in terms of section 76 was at all times directed to the Labour Commissioner, who is a government appointee. The government introduced an amendment in 2004 and disputes were henceforth referred directly to the office of CMAC.[223] If conciliation fails, the parties may directly refer the dispute to the Industrial Court for adjudication as arbitration is not compulsory.

Although it is not compulsory to attend conciliation, disputants are strongly encouraged and persuaded to attend conciliation, and if they fail to do so, "the Commissioner may refer the matter to arbitration and the arbitrator may grant default judgment".[224] It is only

[221] This body, also referred to as CMAC, is established in terms of section 62 of the Industrial Relations Act, Act 1 of 2000. A similar body established in Lesotho is called Directorate of Dispute Prevention and Resolution (DDPR) established in terms of Labour Code (Amendment) 2000.
[222] Act 1 of 2000.
[223] LLM Dissertation, BS Dlamini, UCT.
[224] Dlamini at p27.

in this instance that the process of arbitration is being used without the parties having first to agree thereto.

4.3. Challenges

Dlamini notes that one of the challenges for the speedy delivery of justice is the fact that in the entire country there is only one Industrial Court sitting only at the capital city which is manned by only two judges.[225] The solution may have to be the appointment of more judges.

5. Conclusion

The countries referred to here have appreciated the importance of having specialised institutions as vehicles to resolve labour disputes. This system is as recommended by the European Union to its members states. These countries are at variance as to whether arbitration should be compulsory and, further, whether the disputants are entitled to be legally represented.

What is worth noting is the fact that for the purpose of the expeditious resolution of disputes, the common trend is to indirectly make conciliation compulsory. This should be encouraged lest the said stage becomes redundant and a waste of time.

The time within which to refer disputes also varies from one country to the other, and it appears that South Africa is the only country which restricts referrals to 30 days, failing which one may have to apply for condonation.

[225] Dlamini at p29.

CHAPTER 6
CONCLUSION

1. Specialised Dispute Resolution Institutions

The establishment of specialised fora to adjudicate over labour disputes has been hailed as a giant leap taken in the labour law discipline. The important characteristics of such tribunals have been to ensure that the disputes are resolved quickly and affordably; that these institutions are easily accessible; and that their procedure are user-friendly to the parties involved in disputes. An additional critical aspect relates to the creation of expertise in the area.

The argument has always been that allowing legal representation in the early stages of a labour dispute resolution process frustrates the primary goal referred to above.

2. Challenges

The ideals aimed at being attained by the institutions are frustrated by physical, human and financial resources. The state would have to inject funding in the process lest the objectives will not be sustained. The possibility of forum shopping between the Labour Court and High Court should be arrested lest the ideals of developing expertise will be frustrated. The quality of settlement and motivation behind settlement of guaranteeing work for commissioners should be discouraged. The carrying out of awards should not be cumbersome for employees, and a different regime should be devised to ameliorate the challenges to give effect to orders.

The introduction of con-arb also had the effect of reducing the duration of adjudication of disputes at the CCMA. The only problem is the fact that the said con-arb is still exercisable at the whims of one of the parties. South Africa may learn from countries such as Swaziland and the UK where the non-attendance of a conciliation process is frowned upon.

The process of con-arb should be compulsory and should act as an encouragement, as in Swaziland, to proceed to arbitration if one party does not appear, or the UK position of adjusting the award depending on who did not attend the conciliation procedure.

3. Legal Representation

The dissertation was primarily ignited by the attempt to challenge the CCMA rules as unconstitutional to the extent that legal representation before the CCMA is limited. The basis for such a claim and the misdirection by the judge in the Gauteng High Court could be sustained by neither the Supreme Court of Appeal nor the Constitutional Court, the latter having dismissed the application for leave to appeal. The Constitutional Court passed a warning to prospective disputants who may intend to challenge the established principle that legal representation is unconstitutional. The Court confirmed that the right to legal representation before administrative tribunals has never been recognised.

The absence of such right has also been noted in the UK, but was questioned as early as 1968 when it was mentioned that the 1929 authority confirming the restriction of legal representation was archaic and no longer relevant or appropriate. If developing countries defer to the practice and experience of developed countries, the question arises as to why the common law principle relating to legal representation should not be jettisoned as other countries, such as the UK, have realised that its import and purpose have run their course.

The main reason for South Africa diverting from providing a constitutional clause guaranteeing the right could include the fact that the state would have to provide funding.

In this regard, it was stated that by Budlender that the paucity of funds should not be employed as a justification to whittle down the rights enshrined in the Constitution.[226]

The solution to avoid the prolonging of the process by the legal representative would have to be to impose cost orders against the representatives personally. This will discourage the raising of technical arguments at any given point in time. It would also be beneficial to the adjudication system since legal practitioners would have to properly assess the merits of the matter before referral. Of more benefit to the employee would be the fact that expenses associated with the execution of awards would be secured by the legal representative. For the benefit of employees, orders and awards should state that where an employee is forced to seek the services of an attorney, the employer would be liable for costs on an attorney-and-own-client scale.

Notwithstanding the foregoing, the chances are slim that the Constitutional Court may declare the discretion as being repugnant to the Constitution. Recourse may then have to be to approach parliament to consider amending the laws which founded Rule 25 of the CCMA Rules. In view of the relationship between the government and the union, the latter may not readily support the proposition since their presence may be rendered redundant if their members may easily be represented legal representatives.

[226] Dugard (2014) at p350.

BIBLIOGRAPHY

	JOURNAL ARTICLES	MODE OF CITATION
1	Albertyn "The New CCMA rules" (2002) 23 *ILJ* 1715	Albertyn (2002) *ILJ*
2	Benjamin "Legal Representation in Labour Court" (1994) 15 *ILJ* 250	Benjamin (1994) *ILJ*
3	Benjamin "Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges" 2009 *Industrial Law Journal*	Benjamin (2009) *ILJ*
4	Benjamin "Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges" (2009) *Industrial Law Journal*	Benjamin (2009) *ILJ*
5	Brand "CCMA: Achievements and Challenges – Lessons from the first Three Years " (2000) *Industrial Law Journal*	Brand (2000) ILJ
6	Burski "The Draft labour Relations Bill 1995 – The Case for Legal Representation at its proposed fora for dispute Resolution" (1995) 16 *ILJ* 529	Burski (1995) *ILJ*
7	Collier "The Right to Legal Representation under LRA" (2003) 24 *ILJ* 753	Collier (2003) *ILJ*
8	Grogan "No Obfuscation, Please: Legal Representation in the CCMA" *Employment Law* 14 (2013)	Grogan (2013)
9	Leeds and Wocke "Methods of Reducing the Referral of Frivolous Cases to the CCMA" (2009) *South African Journal of Labour Relations* 28	Leeds and Mothiba (2009) SAJLR
10	Mischke "Keys to Success – Dispute Resolution in terms of Labour Relations Act" (1996) *Contemporary Labour Law,* Volume 5, Issue II, 101	Mischke (1996)
11	Smythe "Legal Representation at the CCMA – Latest Developments" (2003) 24 *ILJ* 1875	Smythe (2003) *ILJ*

12	The Explanatory Memorandum to the Labour Relations Bill – 1995 *ILJ* 278	
13	Van Dockum "Legal Representation at the CCMA", (2000) 21 *ILJ* 836	Van Dockum (2000) *ILJ*
14	Van Eck BPS "Representation During Arbitration Hearings: Spotlight on members of the Bargaining Councils" TSAR 2012-4	Van Eck (2012) *TSAR*
15	Van Eck & Mathiba "Constitution Seventeenth Amendment Act. Thoughts on the Jurisdictional Overlap, the Restoration of the Labour Court and the Demotion of the Supreme Court of Appeal" (2014) *ILJ* 863	Van Eck and Mathiba (2014) *ILJ*
16	Van Niekerk "Speedy Social Justice: Streamlining the statutory Dispute Resolution Processes" (2015) *ILJ* 27	Van Niekerk (2015) *ILJ*

	BOOKS	
1	Bosch *The Dispute Resolution Digest – An Evaluation of the Labour Court* 2015	Bosch (2015)
2	Dugard *Constitutionalism of the Global South – Courts and Structural Poverty in South Africa* (2014)	Dugard (2014)
3	Du Plessis and Fouche, *A Practical Guide to Labour LAW*, (2015) 8th Edition	Du Plessis and Fouche (2015)
4	Du Toit D, Godfrey, Cooper Cohen GGT., Conradie B., Steenkamp A., *Labour Relations Law: A Comprehensive Guide*, 6th edition, (2011)	Du Toit et al, (2011)
5	Du Toit *The Labour Relations Act, Act 1995: A comprehensive Guide* 2nd ed (1998) Lexis Nexis, Butterworths 306	Du Toit D., (1998)
6	Fenwick and Novitz *Human Rights at Work* (2010)	Fenwick and Novitz (2010)
7	Grogan *Labour Litigation and Dispute Resolution* (2014) 2ND Edition	Grogan (2014)

8	*Labour Law Through Cases* Lexis Nexis service issue 6 May 2005	
9	Van Eck *Human Rights at Work: Perspectives on Law and Regulations* (2010)	Van Eck (2010
10	Van Niekerk, Smit, Christianson, McGregor and Van Eck, *Law@Work* (2015) 3rd Edition	Van Niekerk *et al* (2015)
11	Van Vuuren *The Dispute Resolution Digest – Time for Reality Check – Stop Playing Marbles while Rome is Burning* (2015)	Van Vuuren (2015

DISSERTATIONS	**MODE OF CITATION**
Buchner JJ. The Constitutional Right to Legal representation during disciplinary hearing and Proceedings before CCMA, a thesis submitted for the degree Master of Laws, University of Port Elizabeth (2003)	Buchner, LLM Dissertation (2003)
Dlamini BS: A Comparison of the South African and Swaziland's Labour Market Regulatory Systems in Dispute Resolution. A thesis submitted for the degree Master of Laws, University of Cape Town.	Dlamini, LLM Dissertation
Mathiba, MK. *The Jurisdictional Conflict between Labour and Civil Courts in Labour matters: A Critical Discussion on the Prevention of Forum Shopping*, a thesis submitted for the degree Master of Laws, UNISA (2012)	Mathiba, LLM Dissertation (2012).
Mphahlele WK: *The Labour Relations Disputes Resolutions System: Is it Effective?* A thesis submitted for the degree Master of Laws, University of Pretoria.	Mphahlele, LLM Dissertation
Van Graan, DJ. *The Grounds for Review of CCMA Awards,* a thesis submitted for the degree Master of Laws, UP (2014)	Van Graan LLM Dissertation (2014).

	CASE LAW
1	*Chemical Energy Paper Printing Wood and Allied Workers Union obo Prince and Shatterprufe v CCMA* (EC3186-02)
2	*Commission for Conciliation, Mediation and Arbitration and others v The Law Society of Northern Provinces (incorporated as the Law Society of the Transvaal)* (2013) 34 *ILJ* 2779 (SCA)
3	*Colyer v Drager SA (Pty) Ltd* [1997] 2 *BLLR* 184 (CCMA)
4	*Country Fair Foods (Pty) Ltd v Theron No and Others (2001) 2 BLLR 134* (LC)
5	*Coyler v Essack (1997) ILJ 1381* (LC)
6	*Cuppan v Cape Display Supply Chain Services* 1995 (4) SA 175 (D)
7	*Dabner v South African Railways and Harbour* 1920 AD 583
8	*Dladla v Administrator* 1995 (3) SA 769 (N)
9	*Herholdt v Nedbank* 2012 ILJ 1789 *(LAC)*
10	*In Vac Air Technology (Pty) Ltd v Metal and Engineering Industries Bargaining Council & others* [2006] 11 *BLLR* 1125
11	*Lace v Diack and others* (1992) 13 *ILJ* 86 (LC).
12	*Lace v Diack* 1995 (3) SA 768 (N)
13	*Law Society, Northern Province v Minister of Labour and others* 2013 (1) SA 468 (GNP)
14	*Makuse v Commission for Conciliation, Mediation and Arbitration Others (2015)* 12 BLLR 1216 (LC)
15	*McClean v Workers' Union* (1929) ALLER 468.
16	*Morali v President of the Industrial Court and Others* ILJ (1987) 130 (LC).

17	*Mutual and Federal Insurance Co. Ltd v CCMA and Others* (1997) 12 BLLR 1610 (LC)
18	*Netherburn Engineering cc t/a Netherburn Ceramics v Robert Mudau (N.O)* (2009) 30 *ILJ* 269 (LAC)
19	*Netherburn Engineering cc t/a Netherburn Ceramics v Robert Mudau (N.O)* 2010 (2) SA 269 CC
20	*Norman Tsie Taxis v Pooe and others* (2005) 26 *ILJ* 109 (LC)
21	*NUM and Another v CCMA and Others* – unreported judgment of Boqwana J delivered on 1 December 2014, case number JA90/2014
22	*NUM v Brinkpan Colliers Ltd* (1986) 7 ILJ 579 (IC)
23	*Pett v Greyhound Racing Association* (1968) 2 ALLER 545
24	*Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* (2) SA 674 (CC)
25	*SA Post Office Ltd v Govender* (2003) 24 *ILJ* 1733 (LC)
26	*Shoprite Checkers (Pty) Ltd v Ramdaw NO and other* (2001) 22 *ILJ* 1603 (LAC)
27	*SOM Garmets Pty Ltd v Van Dokkum (1997) 9 BLLR 1234 (LC)*
28	*Unison (No 2) versus The Lord chancellor (2014)* EWHC 4198 (Admin)

WEBSITES

www.lexology.com/library/detail.aspx accessed on 24 September 2017

http://www.lexology.com/library/detail.aspx?g=717ee3c-a59e-4001-b19b-b58ad160..

Accessed on 6 October 2015

http://www.lexology.com/library/detail.aspx?g=5f1f3971-8eeb-44f9-986-

6a9135b1cbc&ut... Accessed on 7 October 2015

INTERNATIONAL INSTRUMENTS
Convention on Labour Relations in Public Service: Convention 51
European Convention on Human Rights

RESEARCH PAPERS
Benjamin "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA) – ILO Working Paper No 47, (April 2013)
Bhorat, Pauw and Mncube "Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data". September 2007
Research Papers 01/09 "*Alternative Dispute Resolution In Employment*" December 2008
Servais *The ILO Law and the Freedom to Strike*
Torul *The Mauritian Law of Procedural Fairness within the Context of Dismissal for Misconduct: A Comparative study with the South African Doctrine of Unfair Labour Practice.*