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Reflections on social justice and the enforcement of the National Minimum Wage Act and the Basic Conditions of Employment Act

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OPSOMMING

Oorwegings oor maatskaplike geregtigheid en die afdwinging van die Wet op Nasionale Minimum Loon en die Wet op Basiese Diensvoorwaardes

Die Wet op Arbeidsverhoudinge 66 van 1995, die Wet op Basiese Diensvoorwaardes 75 van 1997, en die Wet op Nasionale Minimum Loon 9 van 2018 is afgekondig om maatskaplike geregtigheid te bevorder. Maatskaplike geregtigheid behels dat alle individue gelyke ekonomiese geleentheid gebied word en dat elkeen op dieselfde maatskaplike regte aanspraak kan maak. Hierdie artikel voer aan dat arbeidsregbeskerming van beperkte waarde is indien geskilbeslegtingsprosesse omslagtig en duur is. In 'n lofwaardige poging om geskilbeslegting vir laagbesoldigde werknemers te vereenvoudig, is 'n vinnige en bekostigbare proses ingevolge artikel 73A van die Wet op Basiese Diensvoorwaardes ingestel. Hierdie artikel ondersteun die implementering van hierdie vereenvoudigde prosedure en wys daarop dat, ten spyte van die positiewe aspekte daarvan, verskeie slaggate steeds die doelwitte van die bevordering van maatskaplike geregtigheid ondermyn. Die artikel sluit af met voorstelle wat moontlik sommige van die geïdentifiseerde probleme kan aanspreek.

1 INTRODUCTION

At an elementary level, labour law can be defined as the legal discipline that regulates the relationships between employers, employees, and the state. At a deeper level, this field of study may be categorised as one that promotes the attainment of “social justice”.¹ In South Africa’s quest to achieve social justice, policy makers have, among other measures, implemented the Labour Relations Act,² the Basic Conditions of Employment Act,³ and the National Minimum Wage

1 Matlou “Understanding workplace social justice within the constitutional framework” 2016 *SA Merc LJ* 544; Van Niekerk & Smit *Law@work* (2023) ch 1.

2 Act 66 of 1995 (LRA).

3 Act 75 of 1997 (BCEA).

Act (NMWA).⁴ Each statute includes the advancement of “economic development” and “social justice” among its goals.⁵

In this article we argue that even though noteworthy gains have been made in respect of the improvement of workers’ rights after South Africa’s first democratic elections in 1994, significant pitfalls remain in the enforcement of certain rights under the BCEA and the NMWA. We argue that the notion of social justice risks becoming a hollow policy statement in the absence of effective enforcement mechanisms. This is particularly true for lower-earning employees who may not have the means to engage in complex litigation. Section 73A of the BCEA introduced a praiseworthy “con-arb” process to assist with the enforcement of statutory claims in terms of the BCEA and the NMWA. This article traverses relevant labour dispute resolution mechanisms, highlights existing pitfalls, and develops proposals aimed at resolving some of the identified challenges.

This article is composed of four main parts. The first part discusses the underlying meaning of the notions of “labour law” and “social justice”. The second part briefly explores the quest for the establishment of affordable and expeditious dispute resolution mechanisms under the LRA. The third part analyses and reflects on the enforcement of labour rights in terms of the BCEA and the NMWA, with an emphasis on problematic areas. The fourth part recommends potential amendments that could assist in achieving the goal of accessible and affordable dispute resolution.

But first, what should be understood by the nebulous notions of “labour law” and “social justice”?

2 LABOUR LAW AND SOCIAL JUSTICE

One of the leading figures in this field, Otto Kahn-Freund, aptly stated that the role of labour law is to establish a more equal balance, or to serve as a “countervailing force”, between socially deprived workers, on the one hand, and economically and socially superior employers, on the other.⁶ Kahn-Freund further argued that there are two key methods of attaining such an equilibrium – through the promotion of collective bargaining, and through the establishment of a statutory floor of rights by governments.⁷

Weiss, another well-known international labour law scholar, notes that during the 1920s, long before Kahn-Freund, the German author Hugo Sinzheimer characterised labour law as consisting of four pillars of regulation.⁸ In the first instance, he suggested that the object of a contract in an employment relationship is not merchandise, but the human being as such. Secondly, labour law seeks to protect those workers who are personally dependent on their employers. Thirdly, human dignity may be weakened by the employment relationship, and thus labour law seeks to remedy this aspect. Fourthly, Sinzheimer emphasised that labour law should ideally encompass more than the scenario of actual employment – it should also address the situation of being jobless.

⁴ Act 9 of 2018 (NMWA).

⁵ S 1 of the LRA and s 2 of the BCEA and the NMWA. These sections are similar in wording.

⁶ Davies & Freedland *Kahn-Freund’s Labour and the law* 3 ed (1983) 18.

⁷ *Ibid.* See also Van Niekerk & Smit 4.

⁸ Weiss “Re-inventing labor law?” in Davidov & Langille *The idea of labour law* (2011) 43–44, with reference to Sinzheimer “Das wesen des arbeitsrechts” in Sinzheimer *Arbeitsrecht und Rechtssoziologie* (1927) 110.

South African policymakers have implemented a social justice approach, rather than one based on libertarianism.⁹ The LRA encourages collective bargaining by promoting the rights of trade unions and protecting the right to strike.¹⁰ In addition, the NMWA and the BCEA establish baseline rights in respect of maximum working hours, leave entitlements, and minimum wages. But what does this often-used and seldom-defined notion of social justice entail, which the trilogy of labour laws referred to above seeks to realise?

We submit that social justice is an imprecise theoretical notion that places the spotlight on the concept “fairness” between individuals in society at large.¹¹ At its heart, it asserts that everyone deserves equal political and economic opportunities, and that all are entitled to the same social rights.¹² It can be argued that the concept is closely linked to the embedded right in the South African constitution to “human dignity”¹³ and the principle that “everyone is equal before the law”.¹⁴

The LRA, BCEA, and the NMWA have each established enforcement procedures that make it possible for workers to enforce their rights. However, this article stresses that the value of labour rights is diminished if it is virtually impossible for low-earning employees – or even dismissed employees – effectively to enforce unpaid minimum wages and other basic entitlements as set out in the BCEA.

3 ENFORCEMENT IN TERMS OF THE LRA

Courts of law are often associated with problems that do not suit the resolution of labour disputes.¹⁵ Lengthy civil court roles, formal procedures, and prohibitively expensive adversarial processes undermine supportive labour dispute resolution.¹⁶ Consequently, in many developed countries, it has become necessary to establish tailor-made dispute resolution institutions for labour disputes, operating separately from the ordinary courts.¹⁷ This role is often fulfilled by tribunals or specialist courts.¹⁸ One of the main reasons for the establishment of the Commission for

9 Van Niekerk & Smit 12. “Libertarianism” refers to an approach that advocates for deregulation within the sphere of employment.

10 Chapters III and IV of the LRA.

11 Cohen & Moodley “Achieving ‘decent work’ in South Africa” 2012 *PER/PELJ* 320; Matlou 544–545.

12 Van Niekerk & Smit ch 1.

13 S 10 of the Constitution of the Republic of South Africa, 1996.

14 S 9(1) of the Constitution provides that “everyone is equal before the law”.

15 Van Eck “The constitutionalisation of labour law: No place for a superior labour appeal court in labour matters: Background to the South African labour courts and the Constitution (part 1)” 2005 *Obiter* 549.

16 Ally & Boonzaier “The constitutional court’s efficiency: Statistics from the Mogoeng era, 2010–2021” 2022 *Constitutional Court Review* 320 state that the principal finding of their study is that the

“average time between the Constitutional Court’s hearing a case and deciding it has increased considerably since 2010. In fact, it has almost exactly doubled”.

Similarly, Cockayne “Gauteng civil justice system in crisis” *Moneyweb* 25 July 2024 reports that the Gauteng civil justice system is in crisis, quoting De Witt, Chair of the High Court Committee of the Pretoria Attorneys Association, who notes that civil trials in the Pretoria High Court are currently being allocated for January 2029. The waiting period between the allocation of a civil hearing date and the hearing itself “has reached an astonishing period of four and a half years”.

17 Aaron *Labor courts and grievance settlement in Western Europe* (1971) vii–xx; Hepple “Labour courts: Some perspectives” 1980 *Current Legal Problems* 169.

18 Van Niekerk & Smit 505.

Conciliation, Mediation and Arbitration (CCMA) was clarified in the *Explanatory memorandum to the Labour Relations Bill*,¹⁹ which envisaged the introduction of a “speedy, cheap, and non-legalistic procedure for the adjudication of unfair dismissal cases”.

The 1995 LRA dramatically overhauled the dispute resolution institutions of the pre-Wiehahn Industrial Court era. In most instances, the LRA stipulates that labour disputes must be subjected to conciliation before finalisation through arbitration or adjudication.²⁰ Parallel to the CCMA, bargaining councils perform similar dispute resolution functions in respect of disputes arising in their respective sectors.²¹ The LRA also establishes a specialist Labour Court, with a superior Labour Appeal Court, both of which perform adjudicatory functions. At the heart of the dispute resolution system of the LRA lies the objective of achieving one of its central aims – “to promote the effective resolution of labour disputes”.²²

The functioning of the CCMA and its enforcement mechanisms are well documented.²³ Suffice it to say that the CCMA serves as the primary dispute resolution institution under the LRA, tasked with conciliating and arbitrating mainly unfair labour practice and unfair dismissal disputes.²⁴ However, as discussed in the parts that follow, it will become clear that the functions of the CCMA have been expanded to include the enforcement of claims instituted under the BCEA and the NMWA. This has led to a blurring of the lines, with overlapping claims being dealt with under the auspices of the CCMA.²⁵ As will be discussed in the next part, this has, in some instances, resulted in difficulties of formulation and interpretation.

There can be no doubt that the CCMA plays a critical role in labour law dispute resolution in South Africa. During the 2023–2024 financial year, the CCMA received a staggering 188 619 referrals²⁶ – an increase of 40 544 from the 184 075 referred cases during the previous year. In addition to its initial mandate to provide dispute resolution services in matters arising from the LRA, its workload has increased significantly.²⁷ Du Toit *et al* confirm that the “introduction of the NMWA and its application to ‘workers’ rather than ‘employees’ has significantly increased the number of employers and employees that are subject to compliance with employment laws”.²⁸

19 1995 *ILJ* 278 285.

20 Van Niekerk & Smit 505.

21 See s 33 of the LRA, which governs the appointment and powers of designated bargaining council agents, and s 33A, which deals with the enforcement of collective agreements.

22 S 1(d)(iv) of the LRA.

23 Du Toit *et al Labour relations law: A comprehensive guide* 7 ed (2023) ch III.

24 Employees who allege prejudice initiate the process by completing and serving the requisite form. Commissioners first attempt to conciliate the dispute. If the matter remains unresolved, it proceeds to arbitration.

25 Du Toit *et al* 753 state that the “2018 amendments have blurred the distinction in the BCEA between the mainly administrative enforcement procedures involving the inspectorate and other legal proceedings to enforce compliance that bridges the gaps between the inspectorate on the one hand and the CCMA, the Labour Court and the civil courts”.

26 CCMA *Annual report 2023–2024* <https://www.ccma.org.za/categories/annual-reports/> (accessed 19-02-2025).

27 Van Eck & Kuhn “Amendments to the CCMA rules: Thoughts on the good, the bad and the curious” 2019 *ILJ* 718.

28 Du Toit *et al* 748.

As discussed below, and in addition to arbitrating all “workers” disputes in terms of the NMWA,²⁹ the BCEA also requires the CCMA, among other functions, to make compliance orders issued in terms of the BCEA³⁰ enforceable, and to conciliate and arbitrate disputes concerning employers’ failure to pay outstanding amounts.³¹ In a positive development, similar to the position under the LRA,³² con-arb procedures have been created for the CCMA in terms of section 73A of the BCEA, with the aim of simplifying and expediting dispute resolution regarding certain claims.

We argue that complicated and expensive litigation undermines the core objectives of labour law and social justice. Wealthy, and often more informed, employers are, generally, in a far stronger position than claimant employees, who may find themselves with their backs against the wall because of their social standing or employment status. After all, as Kahn-Freund observed, the purpose of labour law is to establish a more equal balance between employers and employees. Overall, we regard it as a positive development that certain functions previously reserved for inspectors and the Labour Court have now been transferred to the CCMA, where dispute resolution is generally less costly, less formal, and more expedient than through labour court processes.

4 ENFORCEMENT IN TERMS OF THE BCEA AND THE NMWA

4.1 The inspectorate, the CCMA, and the Labour Court

The predecessor to the current BCEA³³ was enforced through the criminal courts.³⁴ Non-adherence to its basic conditions of employment resulted in criminal prosecution; unpaid wages had to be recovered through civil proceedings.³⁵ In a deliberate attempt to decriminalise enforcement and to strengthen enforcement mechanisms, the current BCEA introduced a comprehensive system of enforcement, administered primarily by the inspectorate of the Department of Employment and Labour (DEL). Significant powers have been assigned to inspectors, enabling them, during a single visit to an employer, to enforce the provisions of the BCEA, the NMWA, the Unemployment Insurance Act,³⁶ and the

29 S 1 of the BCEA defines the term “employee” to mean “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration and ... any person who in any manner assists in carrying on or conducting the business of an employer”. S 1 of the NMWA, in turn, defines the term “worker” to mean “any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind”. Commentators are unanimous that this constitutes a significant broadening of the scope of application of the BCEA, insofar as the BCEA specifically provides for the resolution of “workers” disputes in terms of the NMWA (Du Toit *et al* 752).

30 S 73(1) of the BCEA.

31 S 73A of the BCEA.

32 S 191(5A) of the LRA was introduced by the Labour Relations Amendment Act 12 of 2002 to provide that the CCMA “must commence the arbitration immediately after certifying that the dispute remains unresolved” where the dispute concerns an unfair dismissal during probation, or an unfair labour practice relating to an employee’s probation.

33 Basic Conditions of Employment Act 3 of 1983.

34 Du Toit *et al* 744.

35 Wesley “Compliance orders: The new instrument for enforcement of labour legislation” 1999 *Contemporary Labour Law* 17.

36 Act 63 of 2001 (UIA).

Unemployment Insurance Contributions Act.³⁷ Wesley confirms that the aim of this new system was to promote an amicable, rather than punitive, approach to non-compliance.³⁸

The inspectorate is at the forefront of enforcing rights accorded under the above-mentioned legislation. Inspectors have been granted powers to inspect employers' workplaces, to advise employers on their statutory duties and employees on their entitlements, to investigate complaints lodged by employees, to secure written undertakings from employers in respect of identified transgressions, and to decide whether to issue written undertakings and/or compliance orders against non-compliant employers.³⁹ An inspector who has reasonable grounds to believe that an employer has failed to comply with a provision of the BCEA, the NMWA, or the UIA may not only secure a written undertaking⁴⁰ but may also issue a compliance order against the employer.⁴¹

Prior to the 2018 amendments, the CCMA played a limited role in the enforcement of the BCEA, and the NMWA was enacted only in 2019. Employees could, essentially, claim amounts owing to them under the BCEA in only two instances in combination with claims brought under the LRA. In the first instance, an employee could claim amounts owed either at the CCMA or at the Labour Court as part of unfair dismissal proceedings.⁴² Secondly, a dispute concerning amounts owed because of a contravention of the BCEA could also be instituted alongside a dispute regarding entitlement to severance pay.⁴³

Previously, the CCMA also had no role in the issue and confirmation of written undertakings or compliance orders in conjunction with the inspectors. The Labour Court played a more prominent role, as all compliance orders had to be confirmed by that court.⁴⁴ The Labour Court also had "exclusive jurisdiction", subject to the Constitution and the Labour Appeal Court, and except where the Act provided otherwise, in respect of all matters arising under the Act. Among other powers, the Labour Court has always had concurrent jurisdiction with the civil courts in respect of any claim concerning a contract of employment, "irrespective of whether any basic condition of employment constitutes a term of that contract".⁴⁵ Before the 2018 amendments, the Labour Court also had the power to adjudicate disputes where employers failed to comply with compliance orders issued by the inspectorate. This procedure frequently led to lengthy delays in the resolution of cases.

4.2 Inspection process and the expanded role of the CCMA

To improve the enforcement processes under the BCEA, and the newly introduced NMWA, significant shifts in responsibility took place between the inspectorate, the CCMA, and the Labour Court. Overall, the CCMA's responsibilities have expanded considerably, resulting in a complex tapestry of choices between enforcement mechanisms.

37 Act 4 of 2002. S 64(1)(dA) of the BCEA.

38 Wesley 17.

39 Ss 64–69 of the BCEA.

40 In terms of s 68 of the BCEA. See also Du Toit *et al* 751.

41 S 69(1) of the BCEA.

42 S 72(2) of the BCEA.

43 S 74(3) of the BCEA, read with s 41(6), regulates the payment of severance pay.

44 S 73(1)–(2) of the BCEA. See also s 68(3) of BCEA, which empowers the Director-General of the DEL to request the CCMA to make an undertaking an arbitration award.

45 S 77(3) of the BCEA.

An inspector may conduct an unannounced inspection by visiting an employer's premises on an *ad hoc* basis. Alternatively, a disgruntled employee may lodge a formal complaint directly with the DEL at any one of its 126 labour centres across the country.⁴⁶ Upon receiving a complaint, the DEL assigns the matter to a labour inspector, who is authorised to visit the workplace and request employment records to verify the claims made.⁴⁷

If the investigation reveals that the employer owes an amount to the employee, the inspector may attempt to secure a written undertaking from the employer for payment of the amount due.⁴⁸ The inspector may also issue a compliance order, which compels the employer to comply within a specified period.⁴⁹ At this stage, the employer may either comply with the order or contest it by referring the dispute to the CCMA within five days.⁵⁰ If the matter is referred to the CCMA, the dispute will be scheduled for con-arb in terms of section 73A of the BCEA. This process will be discussed in greater detail later.

Should an employer choose to ignore a compliance order and fail to challenge it by referring a dispute to the CCMA, the labour inspector will issue a confirmatory notice. This notice informs the employer that the matter will be referred to the CCMA to have the compliance order made an arbitration award.

If the employer still does not comply with the order, the Director-General may then file an application with the CCMA to have the compliance order converted into an arbitration award.⁵¹ Upon receiving the referral, the CCMA may issue such an arbitration award, mandating compliance with the original order, provided that the compliance order was duly served on the employer and that the employer has not referred a dispute in accordance with section 69(5).⁵²

Should the employer disregard the order, and once the arbitration award has been issued, the DEL may apply to the CCMA for a writ of execution pursuant to section 143 of the LRA. Section 143(1) expressly provides that an "arbitration award issued by a commissioner is final and binding and may be enforced as if it were an order of the Labour Court as though a writ has been issued."⁵³

From the above it is clear that a number of procedural layers may unfold before a matter is brought before the CCMA. To further complicate matters, the Minister of Employment and Labour may also confer the powers of an inspector on designated

46 Sch 1 of the LRA. See the question and answer to the Minister of Employment and Labour published by the Parliamentary Monitoring Group (<https://pmg.org.za/committee-question/23443/> (accessed 06-04-2025)).

47 S 66(1) of the BCEA.

48 S 68(1) of the BCEA.

49 S 69(1) of the BCEA.

50 In terms of s 69(5) of the BCEA, employers are required to comply with a compliance order within the specified timeframe, unless they elect to refer a dispute concerning the order to the CCMA within that period. Rule 31B(5) of the Rules for the Conduct of Proceedings before the CCMA provides that such a dispute must be referred to the CCMA within five days from the date on which the Department of Employment and Labour served the application for the undertaking or compliance order to be made an arbitration award.

51 S 73(1) of the BCEA.

52 S 73(2) of the BCEA.

53 Furthermore, s 143(5) specifies that "notwithstanding subsection (1), an arbitration award requiring a party to pay a monetary amount must be regarded for enforcement purposes as equivalent to an order of the Magistrate's Court".

agents of bargaining councils.⁵⁴ These agents assist with the enforcement of collective agreements concluded within the relevant bargaining council.

The introduction of the con-arb procedure under section 73A of the BCEA may be regarded as a positive development. It enables employees earning below the statutory earnings threshold⁵⁵ to bypass both the DEL's inspectorate and the Labour Court to enforce claims for outstanding amounts.

4.3 Section 73A of the BCEA

Section 73A(1) of the BCEA provides that “[d]espite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, *may* refer a dispute to the CCMA concerning the failure to *pay any amount owing* to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, *a contract of employment, a sectoral determination or a collective agreement*”.⁵⁶

When one analyses section 73A(1) of the BCEA and the subsections that follow several key aspects emerge.

In the first instance, although section 77 of the BCEA confers exclusive jurisdiction on the Labour Court in respect of “all matters in terms of the Act”, except “where this Act provides otherwise”, it is evident that the BCEA now permits claimants to approach the CCMA directly in respect of a “claim for failure to pay any amount”.⁵⁷ The word “may” suggests that a claimant retains the discretion instead to pursue the matter before the Labour Court. Thus, the practical effect of section 73A is that it grants employees and workers the option of utilising arbitration proceedings at the CCMA to enforce claims for outstanding amounts under the BCEA and NWMA, without the need simultaneously to institute claims related to unfair dismissal or severance pay.

Secondly, the section makes it clear that outstanding amounts in respect of claims emanating from “a contract of employment, a sectoral determination or a collective agreement” may be instituted under section 73A(1). The provision is not limited to statutory claims relating to minimum wages, outstanding leave pay, or unpaid notice pay. Claims arising from the common-law contract of employment, as well as those based on bargaining council agreements, are expressly included. This extends the reach of the section.

Thirdly, section 73A(2) provides that this mechanism does not apply to employees or workers earning above the BCEA's threshold amount. We support the position that the expedited processes of section 73A are available only to lower-earning employees. The threshold amount is playing an increasingly important role in assisting such employees, who often lack the means to access more complex dispute resolution procedures that may require legal representation.⁵⁸

⁵⁴ S 33 of the LRA.

⁵⁵ S 77A(3) of the BCEA. The Minister of Labour and Employment issues and updates the earnings threshold in terms of s 6(3) of the BCEA. Since 1 April 2025, the earnings threshold is R261 748.45 per year.

⁵⁶ Emphasis added.

⁵⁷ Nonetheless, it is important to note that s 73A is specifically limited to claims for monetary payments. This excludes claims for specific performance of obligations that do not relate to outstanding amounts of money, as such matters remain within the jurisdiction of the Labour Court (see 77A(e) of the BCEA).

⁵⁸ Amongst other things, the threshold amount plays a role in strengthening the legal position of lower-earning employees in the following circumstances: (a) the presumption as to who

Higher-earning workers may institute claims for unpaid amounts in the Labour Court, the High Court, or, subject to jurisdiction, the Magistrates' Court, or the Small Claims Court. However, the calculation of the threshold amount has unfortunately led to difficulties of interpretation, which have not served the interests of lower-earning employees.⁵⁹

Fourthly, there is no requirement that an inspector must first investigate any underpayment and issue a written undertaking or compliance order before a claim may be submitted to the CCMA. An aggrieved employee simply completes the requisite form and serves it on both the employer and the CCMA. Upon receiving a referral, the CCMA will facilitate dispute resolution through conciliation and must commence arbitration "immediately" after certifying that the dispute remains unresolved.⁶⁰ As such, parties may not object to the con-arb process, unlike in certain cases involving unfair dismissal or unfair labour practices.⁶¹

Fifthly, in terms of the amended CCMA rule 25(c), legal representation is permitted only in limited circumstances during unfair dismissal proceedings before the CCMA relating to dismissals for misconduct or incapacity, as well as arbitration disputes under section 73A of the BCEA. A commissioner may permit legal representation where it would be unreasonable to expect a party to proceed without such assistance, taking into account, among other factors, the legal questions involved, the complexity of the matter, the public interest, and the relative capabilities of the parties.⁶² The rationale behind this is to prevent reliance on technical legal arguments and to expedite dispute resolution processes.

Sixthly, in any proceedings relating to allegations by employees that rights or protections under the BCEA or the NMWA have been infringed, the worker must establish a factual basis for the alleged transgression, whereupon the onus shifts to the employer to prove that no infringement occurred.⁶³

We supports the efforts by policymakers to make it easier for lower-earning employees to enforce their claims. As previously stated, this aligns with the broader objective of advancing social justice. However, despite these positive developments, it must be noted that there are several pitfalls associated with the section 73A process.

4.4 Disputes under the auspices of bargaining councils

As mentioned above, section 73A(1) of the BCEA makes it clear that claims arising from collective agreements concerning outstanding amounts owed to lower-earning employees are also subject to the con-arb process.⁶⁴ However, in a disappointing development, it has become apparent that the wording of section 73A(1)

qualifies as an employee (s 200A of the LRA; s 83A of the BCEA); and (b) the protection afforded to employees employed through the temporary employment services or on fixed-term contracts (s 198A and B of the LRA).

59 See the discussion in para 4.5 below.

60 S 73A (5) of the BCEA.

61 S 191(5A) of the LRA provides that "... the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns the dismissal of an employee for any reason relating to probation, unfair labour practice relating to probation and any other dispute contemplated in subsection (5)(a) in respect of which no party objected to the matter being dealt with in terms of this subsection".

62 Rule 25(1)(c) of the LRA.

63 S 81 of the BCEA.

64 S 73A(1) of the BCEA.

may not align with other provisions of the LRA. Case law suggests that employees seeking to recover amounts stipulated in collective agreements should utilise the dispute resolution mechanisms established by the relevant bargaining council.

In *NASECGWU obo David Motloung and Calvin and Family Security*,⁶⁵ the CCMA commissioner considered a matter in which the trade union initially referred an enforcement dispute concerning underpaid wages to the National Bargaining Council for the Private Security Sector. The bargaining council issued a document stating that it lacked jurisdiction to hear the under-payment dispute. The central issue before the CCMA was whether it had jurisdiction to arbitrate enforcement disputes under section 73A of the BCEA, in circumstances where a bargaining council collective agreement was in place.

The CCMA held that section 73A does not confer the right to implement the section 73A con-arb procedure on bargaining councils. The commissioner considered and followed *Ekhuruleni Metropolitan Municipality v South African Municipality Workers Union*,⁶⁶ where the court confirmed two important principles – collective agreements should take precedence over the provisions of the BCEA, and the BCEA cannot be interpreted in a manner that conflicts with the LRA.

This line of reasoning was also followed earlier in *Rukwayo v Kitchen Bar Restaurant*,⁶⁷ where the Labour Court confirmed that section 33A of the LRA set out specific enforcement mechanisms for non-compliance with collective agreements. This process includes the appointment of a designated agent to investigate a complaint, issue a compliance order, and refer the dispute to arbitration before the relevant bargaining council.

Note that *Ekhuruleni Metropolitan Municipality* and *Rukwayo* were decided before the 2018 amendments introduced the section 73A con-arb procedure.

In a more recent decision by the Labour Court, *Kgasane v MEC Department of Health: Free State*,⁶⁸ the court adopted a different, seemingly contradictory, approach. In this case, a retired employee claimed that his former employer had failed to pay out his accumulated leave days. He approached the Labour Court because his salary, at the time of employment, exceeded the earnings threshold. The employer contended that the Labour Court lacked jurisdiction, as the claim was based on a provision in a collective agreement and, in its view, could be enforced only through arbitration by the relevant bargaining council. However, the judge held that the Labour Court did have jurisdiction to determine the claim, as a plain reading of section 73A permits employees to pursue claims for non-payment based on a collective agreement.

From the above, it is evident that the legislature sought to promote social justice by introducing an affordable and expeditious enforcement mechanism for the recovery of outstanding amounts. However, the provisions of the BCEA may potentially conflict with sections 32 and 33A of the LRA. There is an urgent need for the legislature to intervene and amend section 73A of the BCEA expressly to permit bargaining councils to implement con-arb procedures, or alternatively, to amend section 33A of the LRA to provide for such procedures. Such an amendment

65 CCMA case number FSBF2009-24.

66 2018 ILJ 546 (LAC).

67 2016 ILJ 1466 (LC). This approach was confirmed by the Labour Appeal Court in *Rukwayo v Kitchen Bar Restaurant* 2018 ILJ 180 (LAC).

68 2025 ILJ 359 (LC).

would enable bypassing the designated agent process and allow for the implementation of con-arb procedures, or, alternatively, confer jurisdiction on the Labour Court to adjudicate claims by higher-earning employees in respect of outstanding amounts arising from collective agreements.

4.5 Determining an employee's earnings in respect of section 73A(2)

It is important to note that whether an employee earns below the earnings threshold constitutes a jurisdictional fact that must be established before the CCMA may consider claims in terms of section 73A.⁶⁹ In *Prestige Campworld (Pty) Ltd t/a Comet Caravans v Botha*,⁷⁰ the Labour Court was required to determine, in a review of a CCMA award, whether the CCMA had exceeded its jurisdiction by adjudicating a section 73A dispute in respect of an applicant who earned above the threshold. The arbitration award that the CCMA commissioner issued, ordered the employer to pay the employee an amount of R48 262.95 in respect of outstanding remuneration. The court considered section 35(5)(a) of the BCEA, read together with the *Government Gazette* of 23 May 2003,⁷¹ and held:

“I am satisfied that, as contended by the applicant, earnings would include commissions earned by the first respondent. These commissions constitute a cash payment to the first respondent, which is guaranteed and not discretionary, and which does not fall within the exclusions referred to above.”⁷²

This decision serves as a reminder to both parties and the CCMA that it is essential first to establish whether the referring party earns below the earnings threshold. Failure to determine the referring party's earnings may result in the matter being redirected to another forum in terms of section 77 of the BCEA – the Labour Court, the High Court, the Magistrates' Court, or the Small Claims Court. The CCMA is a creature of statute and thus cannot confer upon itself jurisdiction it does not have.

4.6 Calculation of the national minimum wage

One of the challenges that may arise when arbitrating disputes under the NMWA is the calculation of a “minimum wage”. The national minimum wage per “ordinary hour worked” increased from R27.58 to R28.79 per hour with effect from 1 March 2025.⁷³ A recurring difficulty in complying with the NMWA is determining precisely what should be included in the calculation of wages.

⁶⁹ The test for review based on a jurisdictional challenge is not the “reasonable decision-maker” test. In such cases, the Labour Court must determine whether the arbitrator was right or wrong (*SA Rugby Players Association v SA Rugby (Pty) Ltd* 2008 ILJ 2218 (LAC)).

⁷⁰ 2022 ILJ 2379 (LC).

⁷¹ S 35(5)(a) of the BCEA provides that “the Minister may, by notice in the Gazette ... determine whether a particular category of payment, whether in money or kind, forms part of an employee's remuneration”. The Minister issued such a determination in GN 691 GG 24889 of 23 May 2003, indicating, among others, that “remuneration includes cash payments made to an employee, except for exclusions specifically listed”. The listed exclusions include: allowances or payments to enable an employee to work; relocation allowance; gratuities and gifts; share incentive schemes; discretionary payments; entertainment allowance; and education and schooling allowances. The court concluded that “earnings” encompass far more than an employee's fixed salary.

⁷² *Prestige Campworld* para 14.

⁷³ The legislative change aims to address longstanding concerns regarding a “living wage” in South Africa. See the DEL's official webpage [https://www.labour.gov.za/national-minimum-wage-\(nmw\)-commission-recommends-cpi-+-1-5-adjustment-for-2025-and-invites-further-proposals](https://www.labour.gov.za/national-minimum-wage-(nmw)-commission-recommends-cpi-+-1-5-adjustment-for-2025-and-invites-further-proposals) (accessed 07-04-2025).

The confusion stems from uncertainty about the statutory definition of wages. Notably, section 5(1) of the NMWA states that, for the purposes of calculating a wage under the Act, it

“is the amount payable in money for ordinary hours of work *excluding*:

- (a) any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation allowance, unless specified otherwise in a [sectoral] determination;
- (b) any payment in kind including board or accommodation, unless specified otherwise in a sectoral determination;
- (c) gratuities including bonuses, tips or gifts; and
- (d) any other prescribed category of payment”.

The courts have grappled with the interpretation of this definition, particularly in cases where employers include commission as a form of payment. In *Atlas Finance (Pty) Ltd v Commissioner for CCMA*,⁷⁴ the Labour Court set aside an arbitration award in which the commissioner had found that the employer had failed to comply with the prescribed national minimum wage. The commissioner held that commission payments did not form part of the minimum wage and that the employer was required to meet the minimum hourly rate. However, the court held that the employer was not in breach of the provisions of the NMWA when it included commission earned by employees in its calculation of a minimum wage, in addition to the fixed wages paid to employees.

Further clarity was provided by the Labour Appeal Court in *Quantum Foods (Pty) Ltd v Commissioner H Jacobs*.⁷⁵ Here, the employer attempted to ensure compliance with the NMWA by amending employee payslips to include a deferred contractual annual bonus and contributions made towards a provident fund as part of employees’ remuneration. The CCMA concluded that these payments did not fall within the scope of section 5 of the NMWA, because they constituted “additional payment”. The Labour Court confirmed the decision of the CCMA.

The Labour Appeal Court held that a deferred bonus, where it constitutes an enforceable contractual obligation, should be included in the calculation of the national minimum wage. The same applied to provident fund contributions, which the court found to fall within the definition of “payable in money for ordinary hours of work.” Any additional payment that lacks an enforceable contractual element is excluded from the definition in section 5 of the NMWA.

We submit that the decision of the Labour Appeal Court regarding the inclusion of provident fund contributions in the calculation of the national minimum wage is to be welcomed, because it provides much-needed clarity in this regard. However, the court’s ruling on the inclusion of deferred contractual bonuses in the calculation is controversial.

It is worth noting that, during 2021 and 2022, government, business, and organised labour tabled proposals for labour law reform at the National Economic Development and Labour Council (NEDLAC). The social partners expressed the view that there is an ongoing need for reform, among others, to create an enabling environment for job creation and ensure the sustainability of small and medium-sized enterprises. NEDLAC established a Labour Law Reforms Task Team, comprising representatives of the social partners, to guide a process from April 2022 to October 2024. This process produced the following documents: the *Final*

74 2022 ILJ 1655 (LC).

75 2024 ILJ 71 (LAC).

NEDLAC report on the law reform process;⁷⁶ the Labour Relations Amendment Bill, 2024;⁷⁷ the Basic Conditions of Employment Amendment Bill, 2024;⁷⁸ and the National Minimum Wage Amendment Bill, 2024.⁷⁹ The *Final NEDLAC report* confirms that the government proposed excluding deferred payments, such as contractual bonuses, from the definition of wages in section 5 of the NMWA. Such an amendment would be a positive development. Wages should include only immediate, and not deferred, payments.

4.6 Section 34(1) deductions from salary

Note that many CCMA claims are brought by employees earning relatively low incomes. As such, the value of these claims is often minimal. The section 73A procedures were specifically designed to facilitate speedy resolution at no cost to employees. However, there are challenges where employees are owed money because of unlawful deductions in contravention of section 34 of the BCEA. At first blush, the employee may be compelled to use the more complex and costly processes in the Labour Court, even where the value of the claim is low. This may discourage affected employees from pursuing their claims, even in cases where they have strong prospects of success.

In *O'Reilly v The Commission for Conciliation Mediation and Arbitration*,⁸⁰ the employee had been appointed as the Registrar and Chief Executive Officer (CEO) of the professional Architectural Council in 2014. In her capacity as CEO, O'Reilly allegedly, and without the employer's authorization, incurred legal fees totalling R242 000 in proceedings against a government department. She was subsequently suspended and charged to appear at a disciplinary hearing. In the meantime, her employer began deducting R242 000 in instalments from her salary in an effort to recover the unauthorised expenditure. The employee did not attend the disciplinary hearing. Instead, she resigned with immediate effect. She then lodged a complaint of constructive dismissal at the CCMA. She claimed both compensation for the alleged dismissal and reimbursement of the amounts deducted, in terms of section 34(1) of the BCEA. The CCMA considered the matter and, during arbitration, found that there had been no constructive dismissal and that it lacked jurisdiction to make an award in respect of an alleged breach of section 34(1) of the BCEA.

On review, the Labour Court held that despite the parties' agreement during the pre-arbitration meeting that the CCMA would determine the claim relating to section 34(1), the CCMA did not have jurisdiction to adjudicate the matter. The Labour Court referred to the decision of the Constitutional Court in *Amalungelo Workers' Union v Philip Morris South Africa (Pty) Ltd*,⁸¹ in which it was confirmed

76 *Final NEDLAC Report on the law reform process* <https://nedlac.org.za/wp-content/uploads/2025/02/FINAL-Nedlac-report-LLRRTT-1102-v13.pdf> (accessed 11-03-2025).

77 <https://nedlac.org.za/wp-content/uploads/2025/02/Attachment-1-Labour-Relations-Act-Amendment-Bill-for-Mancom-corrected.pdf> (accessed 11-03-2025).

78 <https://nedlac.org.za/wp-content/uploads/2025/02/Attachment-3-BCEA-Amendment-Bill-for-Mancomcorrected-.pdf> (accessed 11-03-2025).

79 <https://nedlac.org.za/wp-content/uploads/2025/02/Attachment-4-NMWA-FOR-MANCOM.pdf> (accessed 11-03-2025).

80 (JR2395/19) [2022] ZALCJHB 33 (28 February 2022).

81 2020 ILJ 863 (CC). Central to this application was the question of whether the jurisdiction of the Labour Court under the BCEA is deferred until a matter has been resolved by a labour inspector. The claim arose from an alleged breach of s 34 of the BCEA, which prohibits an

that section 77(1) of the BCEA confers exclusive jurisdiction on the Labour Court and the High Court to adjudicate all claims under the BCEA. Nowhere in the BCEA is it stated that the CCMA has jurisdiction to hear matters relating to breaches of section 34(1).

We submit that the BCEA does not clearly indicate whether section 73A also applies to deductions made from employees' salaries. Section 73A specifically provides that disputes arising from contracts of employment fall within the scope of claims under this section. It would be a positive development if section 73A were amended to clarify that employees earning below the earnings threshold are entitled to recover amounts unlawfully deducted from their salaries, on the basis that such claims arise from the contract of employment and may accordingly be considered during arbitration proceedings before the CCMA.

5 CONCLUSION

The con-arb procedure established under section 73A of the BCEA is a commendable effort to promote equal access to justice, particularly for lower-income earning employees. This procedure enables workers to access the enforcement mechanisms of the CCMA directly, without requiring the intervention of the inspectorate of DEL or the need to enforce their statutory rights through the Labour Court proceedings. However, despite the positive aspects associated with the section 73A procedures, there are unintended limitations that warrant reform.

We propose that section 73A be amended to clarify that disputes concerning the non-payment of monies owed to employees earning below the earnings threshold, in terms of collective agreements, also fall within the scope of the con-arb procedure. Furthermore, we suggest that such con-arb proceedings should be conducted under the auspices and supervision of the relevant accredited bargaining councils.

Where a bargaining council does not have the necessary accreditation to resolve disputes, such disputes should be eligible for referral to the CCMA. The rationale for preferring referral to the relevant bargaining council, rather than the CCMA, is the already substantial workload shouldered by the CCMA. Also, it can be reasonably assumed that most workers lodging claims would, in any event, earn amounts in excess of the national minimum wage prescribed by the NMWA, as determined by their respective bargaining council agreements. The claims in question will, in all likelihood, pertain to the non-payment of overtime work, salaries, or accrued leave – conditions of employment typically regulated by sectoral bargaining councils, which have detailed and specialised knowledge of such matters.

A further amendment that would facilitate the expeditious resolution of disputes would be to revise section 34 of the BCEA, which governs unlawful deductions by employers from employees' remuneration. Section 73A already provides for the con-arb procedure in relation to claims arising from contracts of employment. It would not be an unreasonable extension to amend section 34 to include a cross-reference to section 73A and to clarify that claims by lower-earning employees should be resolved through the CCMA's con-arb process. This approach offers a less formal and cost-effective alternative to Labour Court proceedings.

employer from making any deduction from an employee's remuneration unless certain requirements are met. The Constitutional Court held that s 77(1) states in unambiguous terms that the Labour Court has exclusive jurisdiction over matters arising from the BCEA. The only exception is where the Act itself provides otherwise. The court found that there is no provision in the BCEA requiring disputes to be submitted first to labour inspectors before the Labour Court may entertain the matter.



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The following contribution met these requirements and was published in 2025:

- BPS van Eck & Foster Maluleke "Reflections on social justice and the enforcement of the National Minimum Wage Act and the Basic Conditions of Employment Act" (2025) 88(4) *THRHR* 491–504

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