

Methods of reducing the referral of frivolous cases to the CCMA

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Abstract

The Commission for Conciliation, Mediation and Arbitration is a statutory labour dispute resolution body that was introduced in 1996. With over 125 000 referrals annually, experience has demonstrated that too many frivolous cases are referred, causing administrative problems and potentially increasing the cost of doing business in South Africa. Propositions, based on international experience from three other labour dispute resolution systems and recommendations in the literature, were tested with the aid of the Delphi technique. Three rounds were conducted with experts in the field. The findings show that there are a number of interventions which, if implemented, would prevent the referral of frivolous cases to the CCMA. In implementing the interventions, the underlying principle needs to be that rights of access and use should be enhanced and not narrowed. Therefore, the interventions focusing on enhancing systems are deemed preferable to those that use exclusionary criteria.

1 Introduction

When the new South African government came into power in 1994, many of the employment disputes referred to the statutory conciliation bodies were unresolved (Bailey 1995; Christie 2001). As a result of this poor record the Commission for Conciliation, Mediation and Arbitration (CCMA) was formed. The primary function of the CCMA is dispute resolution in terms of section 112 of the Labour Relations Act 66 of 1995, and the focus is on the efficient resolution of labour disputes (Bailey 1995). A founding tenet of the CCMA is that access should be easy and free and that justice is not a function of either formal education or disposable income.

From inception until 31 January 2007 the CCMA has processed 1 069 400 labour disputes and it currently receives about 120 000 referrals a year with a settlement rate of about 78%. This has led to a far higher caseload than was ever envisaged (CCMA Fees and Costs Fact Sheet, 2007; Mdlalana 2007; Wilmot 2007), a caseload that is considered high for South Africa's level of employment (Christie 2001). This may be indicative that a high number of cases are being submitted without merit, where submissions are illogical or ill-informed. The excessive number of disputes referred to the CCMA is largely due to the ease of access to the CCMA and the high levels of unemployment in South Africa (Bendeman 2006; Mischke 2006). In this economic

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climate the fairly rational response of an employee who has lost his/her job, whether fairly or unfairly, is to refer the matter to the CCMA in the hope and expectation of receiving some form of compensation (Venter 2006). The referral of cases by ill-informed or ill-intentioned individuals who see the CCMA as a vehicle for ill-gotten financial gain is at the expense of those with legitimate claims. When such cases are entertained or achieve a degree of success, there is a temptation for others to refer their cases, regardless of the merit of those cases, and thus a spirit of entitlement is created (Christie 2001). In addition, unions are suspected of referring all cases regardless of the merit of the cases (Bendeman 2006).

A further matter complicating the speedy resolution of legitimate cases in the CCMA is the evolution of its processes. Cheadle is quoted by Hazelhurst (2006) as criticising the CCMA for excessively elaborate procedures during disciplinary hearings, where commissioners begin to behave as if they were judges and want their awards printed in law reports. This, combined with an excessive administrative burden, inevitably leads to a reduction in the performance of the CCMA and potential increases in employment costs in South Africa.

2 Purpose of the study

The purpose of the study is to identify and evaluate methods to reduce the referral of frivolous cases to the CCMA. The definition of a frivolous case is based on Judge Boshoff's statement in *S v Cooper and Others* (1977 (3) SA 467) that frivolous "in its ordinary and natural meaning connotes an application characterised by lack of seriousness, as in the case of one which is manifestly insufficient".

3 Literature review

3.1 Methods of reducing frivolous referrals to the CCMA

The most prominent suggestions in the literature for reducing the chance of frivolous referrals include charging referral fees, awarding costs against parties that refer frivolous cases, allowing for greater legal representation, and introducing qualification criteria for referrals.

3.1.1 Referral fees

While access to the CCMA is free of charge, Levy and Venter (2006) find that approximately 47% of the CCMA's caseload comes from categories of employees who would generally be in a financial position to pay some form of referral fee to have their cases heard. Referral fees were considered in the 2000 LRA Amendment Bill but, owing to a lack of support, were not included in the final Amendment Act (Benjamin & Gruen 2006). International experience regarding referral fees within dispute resolution mechanisms is diverse. The Australian Industrial Relations Committee (AIRC) charges a lodgement fee of \$A55.70. This can, however be waived in cases of financial hardship (www.airc.gov.au). In the United Kingdom, there is no lodgement or administration fee payable for referral to the Advisory, Conciliation and Arbitration Service (ACAS) or the Employment Tribunal (www.acas.org.uk and www.employmenttribunals.gov.uk). Halbach, Paland, Schwedes and Wlotzke (1994) state that the aim of the German Labour Court proceedings is to reduce costs. To this end there are no court fees for proceedings leading to a ruling. In cases leading to a judgement, fees are charged, although these fees are lower than in other courts of law.

The fees are payable only when the proceedings have been finalised and will be waived if a settlement is reached before a ruling is given.

3.1.2 *Costs and cost awards*

Parties to the CCMA arbitrations are generally responsible for covering their own costs in referring or defending the matter. These costs could include legal fees (if lawyers are used), travel and subsistence fees as well as the cost of being absent from one's normal daily activities. Depending on the nature of the case, these costs could be substantial. Section 138(10) of the LRA provides for the Commissioner to order one party to pay the other party for certain expenses incurred in having the dispute resolved through the CCMA in the case of arbitration where a party acted in a frivolous or vexatious manner. Levy and Venter (2006) comment that the 2002 LRA amendments did alleviate the onus of proof for costs to be awarded, now only requiring that a commissioner make an order for the payment of costs according to the requirements of law and of fairness. Despite this, their research shows that commissioners appear hesitant to award costs and very few cost awards are actually made. Benjamin and Gruen (2006) show that costs were awarded in only 0,466% of cases, which equates to a total of 89 cost awards being issued over the four-year period between 2001 and 2005. In the year 2006/7 only 0,7% of awards included costs. Of these awards, two-thirds were awarded against employees (Levy & Venter 2006).

The international experience is similar to that of South Africa. In Australia the Commissioner will warn a party before awarding costs (Hagglund & Provis 2005), and in the UK a party's ability to pay is an important factor in the decision to award costs (www.employmenttribunals.gov.uk; www.adviceguide.org.uk). The German system follows the view that in principle the losing party must pay all the costs, including those of the adverse party in so far as these costs were necessary for the purposes of litigation or defence (Halbach et al 1994). To ensure that all parties have the same rights to defend or prosecute necessary actions, legal aid may be granted to individuals with low incomes. A condition for such legal aid is, however, that the case has a reasonable prospect of success and does not appear to be arbitrary.

3.1.3 *Legal representation*

From inception of the CCMA, the Labour Court and the Constitutional Court have all come to the same conclusion - there is no absolute right to legal representation at the CCMA (Smythe 2003). However, the debate concerning legal representation during CCMA processes is ongoing. The South African Minister of Labour, Minister Mdlalana (2007) stated that lawyers tend to complicate and prolong cases unnecessarily to inflate their charges, to the detriment of both employers and employees. In addition, it is argued that lawyers often delay proceedings owing to their unavailability or the approach adopted and consequently place individual employees and small business at a disadvantage because of mounting costs (Benjamin 1994; Buirski 1995). In response to this view, the Law Society believes that if individuals were not allowed a right to legal representation, a grave injustice would be done (Temkin 2007).

Internationally the different labour adjudication systems have also grappled with the problems posed by the legal representation of parties to proceedings. The Australian Industrial Relations Act aims to achieve the prevention and prompt settlement of industrial disputes, just as the CCMA does. But in practice legal representation is the norm rather than the exception and individuals referring a matter are encouraged to seek legal or other professional advice as soon as possible (www.airc.gov.au;

Benjamin 1994). In the United Kingdom lawyers are playing a major and increasing role in Employment Tribunal cases, with the result that Employment Tribunals have evolved into far more legalistic bodies since lawyers have been allowed to represent the parties (Latrielle, Latrielle & Knight 2005; Levy 2006). In Germany an individual may appear in person, or be represented by a lawyer and the court must assign a lawyer to an unrepresented party who requests one if he has insufficient resources to procure his own legal representation (Benjamin 1994; Halbach et al 1994; Noack 2006).

3.1.4 *Qualification criteria*

There are no qualification criteria for access to the CCMA. Benjamin and Gruen (2006) report that there is a broadly held perception that a substantial proportion of dismissal cases referred to the CCMA concern employees with an extremely short length of service. This factor is seen as having a restricting effect on decisions by employers to employ additional employees. Although the issue of a probationary period was debated at length during the negotiations on the 2002 Amendment Bill (Benjamin & Gruen 2006), there was no final agreement on a probationary period and it was therefore not included in the Act. Furthermore, no consideration appears to have been given to introducing a relationship between a probationary period and a CCMA qualification period.

In Australia, unfair dismissal protection has reasonably stringent qualification criteria. A case will be accepted only if the employee is engaged in a business that employs in excess of one hundred employees, the employee earns less than a prescribed cap (currently \$A101,300 per annum) and the employee has completed 6 months of employment (Thompson 2006, AIRC 2007). In the United Kingdom there is no protection from unfair dismissal for employees with less than one year's service except in cases where dismissal is by reason of involvement with a trade union, health and safety activities or similar (Employment Tribunals Service www.employmenttribunals.gov.uk; Levy 2006). The German law allows for a six-month probationary period, during which time an employer may dismiss an employee without any particular justification. Small organisations (with no more than ten employees) may dismiss an employee without a particular reason regardless of the number of years of service (Noack 2006).

4 Research methodology

The methodology used in this research is known as the Delphi technique. The Delphi technique was first used by the Rand Corporation in the USA in the 1950s in defence research, but has since developed into a mainstream research method (Williams & Webb 1994). The Delphi technique is an iterative multi-stage process and involves questioning a panel of experts on specific questions or issues until consensus is reached. The first round involves searching for meaning and is therefore qualitative in nature. Once the meaning has been identified, the subsequent rounds attempt to reach consensus and in doing so quantify the meaning (Keeney, Hasson & McKenna 2001). Hasson, Keeney and McKenna (2000) outlined four research objectives that called for the use of the Delphi technique to explore or expose underlying assumptions or information leading to differing judgements; to seek out information which may generate a consensus on the part of the respondent group; to correlate informed judgements on a topic spanning a wide range of disciplines; and to educate the respondent group as to the diverse and interrelated aspects of the topic.

The technique is a quick and relatively efficient way of combining the knowledge and abilities of a group of experts (Powell 2003; Beech 1999); there is controlled feedback between rounds (Sindhu, Carpenter & Seers 1997) and it is generally anonymous, which encourages honest opinion free from peer group pressure (Keeney et al 2001). The Delphi technique involves asking respondents to put forward as many relevant issues as possible in round one. These responses are then analysed and act as a springboard for the rest of the Delphi process. Feedback from round 1 is provided in the form of a second questionnaire and opinion is sought on the issues raised. This process continues for subsequent rounds until consensus is reached (Keeney et al 2001). In this research study consensus was reached in the third round.

4.1 Sample composition

The experts for this research were selected on the basis of non-probability judgemental sampling. The criterion applied for the selection of individuals for the sample was detailed knowledge of, or extensive experience in, the CCMA processes. Ten experts participated in this research; three were lawyers who represent clients in the CCMA, three were industrial managers with experience at the CCMA, two were trade unionists, and two CCMA commissioners. The research was conducted via a 3-round Delphi technique.

4.2 First round questionnaire

The first round questionnaire was developed from the literature review, and from informal discussions with various subject matter experts. The purpose of the first round questionnaire was to test the viability, applicability and acceptability of international experience and practice in the South African environment in seeking to prevent the referral of frivolous cases to the CCMA.

The questionnaire consisted of ten questions covering all the research propositions. The questions asked were open-ended and required opinions from each of the experts interviewed. A total of ten respondents participated in round one. The data gathered and captured into the control document were consolidated and ordered on the basis of the frequency with which they were mentioned.

4.3 Second round questionnaire

After the data from round one had been analysed, the second questionnaire was developed. The purpose of the second questionnaire was to explore and narrow down the issues raised in round one in an attempt to seek consensus.

The second round questionnaire consisted of 32 questions, 29 ranking statements, 2 demographic questions and 1 open-ended question. The 29 ranking statements required each respondent to rank the statement on a 1–5 Likert scale (representing “strongly agree”, “agree”, “neutral”, “disagree” and “strongly disagree”). A total of 9 respondents completed round two. The data from the second round were analysed by means of a frequency analysis and are attached as Appendix 1.

4.4 Third round questionnaire

Issues that had been favourably received or where consensus was achieved or where some inconsistency was evident were explored in round three. These issues were developed into possible interventions which, if implemented, may prevent frivolous

cases being referred to the CCMA. In round three the panel members were asked whether they believed that if these interventions were implemented they would be successful in preventing the referral of frivolous cases. The respondents were asked to rate each of the interventions on a three-point scale with the descriptors of “more likely”, “likely” or “less likely” to prevent the number of frivolous cases. A total of 12 interventions were identified and were included in the third round questionnaire. A total of 8 respondents completed round three. The data collected in round three were analysed in two ways. Firstly, each intervention was evaluated independently. This analysis was conducted on the basis of a frequency evaluation to identify whether any inconsistencies were evident from the previous rounds. No significant inconsistencies were identified. The second level of analysis was conducted by weighting the responses by awarding 3 points to each “more likely” response, 2 points to each “likely” response and 1 point to each “less likely” response. The points were then totalled for each intervention. The interventions were then ranked according to the total number of points awarded to them. The results are attached as Appendices 2 and 3.

5 Findings

The research findings from the three rounds show the extent of frivolous cases and possible methods of reducing frivolous cases. Methods considered were the amendments to the current CCMA procedures and processes, the introduction of a referral fee, the more frequent award and enforcement of cost awards, the amendment of the rules around legal representation, and the introduction of qualification criteria for the referral of cases.

5.1 *Extent of frivolous cases in the CCMA*

Although data on the extent of frivolous cases referred to the CCMA are not available, all the respondents in round one indicated that the CCMA has to contend with too many frivolous cases and these account for the particularly high referral rate.

In exploring why there are too many frivolous cases in the CCMA, several respondents stated that for many trade union members, the commonly held belief is that your membership fee entitles you to a CCMA hearing, regardless of the merits of your case. One respondent went on to say that often the trade unions do not have the heart to tell their members they have no case, so they just refer the matter anyway, further entrenching the belief that trade union membership entitles one to CCMA representation.

However, many non-union members also take advantage of the CCMA structures and refer frivolous cases. A respondent commented that we are living in an increasingly litigious society and the CCMA is seen as an easy and cheap forum for individuals to exercise their rights in the hope of receiving some compensation for their perceived ill-fortune. Another respondent believed that if as an employer you “succumb” to reaching a voluntary financial settlement at conciliation with one employee, other employees believe that this is company policy or precedent and will also refer matters to the CCMA in the hope of achieving the same result.

Commenting on broader socioeconomic conditions, respondents said that unemployment is a contributing factor to the number of frivolous cases in the CCMA. One of the respondents is quoted as saying that we should spend more time creating jobs than fighting over the few jobs we have. We need to be addressing the broad issue

of economic growth and unemployment as well as addressing the litigious culture that is developing.

5.2 Methods of reducing frivolous cases

5.2.1 Amendment of CCMA procedures and processes

A question in round one of the research asked the respondents what, if any, changes they would make to the CCMA's dispute resolution processes to prevent the referral of frivolous cases. Three areas were emphasised: the screening process, the con-arb process and the possibility of affording greater powers to the conciliation commissioners to dismiss frivolous cases.

5.2.1.1 CCMA screening processes

When a dispute arises, the applicant (generally the employee) completes the appropriate paperwork and mails, faxes or delivers the documentation to the CCMA. It is also a requirement that the documentation be served on the respondent (generally the employer). The documentation is then screened by a CCMA case management team and set down for either conciliation or con-arb. Levy and Venter (2006) state that it appears as if a large number of CCMA referrals get no farther than the front desk but that there is very little understanding of what the screening process is and what criteria are applied in determining whether a case should be accepted or not. The 2005/6 CCMA Annual Report records that 31,3% of cases referred to the CCMA were deemed to be non-jurisdictional and were eliminated at entry point. Furthermore, the report mentions a process known as pre-conciliation, where a further 15,2% of referred matters are expediently dealt with. Although many of the respondents were not aware of this process, the report indicated that it has been introduced to improve entry-point services and results in the quick, cost-effective resolution of uncomplicated disputes.

Although it would appear that the CCMA screening mechanism is relatively robust, this view is not necessarily shared by the respondents. The respondents firmly believe that a stricter screening process would be the single largest contributor to preventing the referral of frivolous cases. One respondent suggested that the case management team be made up of skilled dispute resolution specialists, perhaps commissioners or retired judges and lawyers, who would be able to review the information presented at a deeper level. On the basis of the documentation presented when a case is referred to the CCMA, a case would either be immediately accepted for dispute resolution or the team would request further information from the respondent or it would dismiss the matter outright. This appears to be what the CCMA is achieving through the pre-conciliation process, however.

In principle the respondents were in favour of the proposal that referrals should be made in person and be evaluated by a skilled dispute resolution specialist. However, round three saw a divergence of opinion when these elements were separated. Although the respondents strongly believe that stricter screening processes will prevent the referral of frivolous cases, requiring that the referrals be made in person is viewed as less likely to reduce frivolous referrals. It can therefore be inferred that the emphasis should be placed on the screening process and the expertise brought to bear on screening the application rather than on requiring that the individual be present at the time of referral. In addition, a stricter screening process may simply be a matter of improving the administrative and pre-conciliation services.

A further suggestion was made in round one that trade unions should be held responsible for the frivolous cases referred by their members. This view enjoyed substantial support in round three and it was argued that trade unions should be held responsible for the frivolous cases referred by their members and any cost award given should be issued to the trade union rather than to the member. This is likely to result in transferring the screening responsibility of trade union referrals to the trade union, rather than to the CCMA. However, Levy and Venter (2006) report that trade unions account for approximately 30% of all referrals so the impact of this suggestion may be somewhat limited.

5.2.1.2 Powers of commissioners

Under the current system, a commissioner has the power to dismiss a case at the conciliation stage if he or she determines that the case falls outside the CCMA's jurisdiction. The research findings suggest that the commissioner should be afforded the same powers to dismiss a case at conciliation if it is clear that the case is frivolous and has no merit. The respondents believe that this will greatly help to reduce the number of frivolous cases in the CCMA.

5.2.1.3 Con-arb

The 2002 Amendments to the LRA 12 of 2002 allowed for a process known as con-arb (conciliation-arbitration) to be introduced into the dispute resolution process. The intention of this change was to expedite and streamline the dispute resolution process. Telford (2000:iii) defines con-arb as "a mechanism in which the disputing parties and a neutral third-party attempt to reach a voluntary agreement through conciliation or mediation, and then if they are unsuccessful, move immediately to arbitration by the same third party". The advantage of the con-arb process is that it expedites the dispute resolution process since in most cases the parties need attend only one hearing. However, the critics of con-arb contend that many mediators/arbitrators lack the skill to manage the different roles required by the different procedures and that unintended information obtained during the informal (and often confidential) mediation process may cause bias, or be used to the detriment of the party in the final arbitration decision (Telford 2000).

The respondents were divided in their views on con-arb. The criticism of the con-arb process offered by Telford (2000) that many mediators/arbitrators lack the skill to manage the different roles required by the different procedures was echoed by one of the respondents. A suggestion was made that con-arb should be dealt with on a single day, but by two different commissioners. This suggestion was not widely accepted by the respondents, however. One of the employer respondents indicated a dislike of the con-arb process because it involves thorough and detailed preparation when the matter could be resolved at the conciliation stage. As the conciliation stage is informal, limited preparation is required and conciliation generally involves simply recounting the facts of the matter. Con-arb requires detailed presentation because if the conciliation is unsuccessful one proceeds immediately to arbitration, for which the preparation is substantial. Conversely, one of the other respondents indicated that when both parties are prepared and have fully evaluated their cases, conciliation is likely to be far more meaningful, as both parties have identified the strengths and weaknesses of their submissions and may be more amenable to a settlement. However, the research did find that whether parties subscribed to the con-arb process or not, it was not deemed to be a contributory factor to the bringing or elimination of frivolous cases. The retention or

discontinuation of con-arb as a dispute resolution process would have no impact on the referral of frivolous cases.

5.2.2 Introducing a referral fee

The CCMA is intended to be free of charge and easy to use so that justice does not become a function of disposable income. Internationally, there is no consistent practice on whether a fee is charged. Where a fee *is* charged, however, it is generally waived in cases of genuine hardship. The results show that the respondents believe that the introduction of an administration fee will result in the reduction of frivolous cases and is the second most likely intervention to prevent frivolous cases.

Despite the respondents believing that an administration fee will lead to a reduction in the number of frivolous cases, the overall opinion in round one was that an administration fee should not be charged. Bendeman's (2006) research revealed that many of the commissioners were of the opinion that no administration fee should be charged. Our respondents were unanimous in stating that *if* an administration fee were to be introduced, a means test should be applied to prevent people suffering genuine hardship being denied access to the CCMA.

5.2.3 More frequent cost awards

The respondents believe that cost awards are the fairest way of penalising those who abuse the system while not infringing on the rights of those who do not and that increasing the frequency of cost awards will prevent the referral of frivolous cases. The respondents are almost unanimous that cost awards should be made only in frivolous cases. A respondent stated that the fear of having a cost award granted against them may make people more circumspect about referring a case. One respondent argued that cost awards penalise those abusing the system without excluding individuals with genuine cases, which administration fees or other qualification criteria may do. Unfortunately cost awards may be difficult to execute. Where an award is issued against an unemployed individual he/ or she is unlikely to be able to pay the award, so that the award is not much of a deterrent.

Suggestions were made and tested as to whether cost awards should be linked to an earnings threshold or to legal representation. In both cases the consensus was that such a link would be undesirable. If the circumstances dictate, cost awards should apply regardless of the earnings level of the applicant or whether legal representation was engaged or not.

5.2.4 The rules on legal representation should be amended

There was consensus among the respondents that removing the current restrictions on legal representation and allowing representation at all arbitration hearings will reduce the referral of frivolous cases but that this is less likely to reduce frivolous referrals than other interventions.

5.2.5 Qualification criteria should be introduced

The overwhelming majority of the respondents believe that qualification criteria will reduce the referral of frivolous cases. However, the suggested qualification criteria were variously evaluated by the panel. The international criterion of limiting CCMA access to employees working in organisations of a particular size was met with universal disapproval. One respondent said that an unintended consequence of this is that employers would manipulate the system to ensure they remained below the regulated size and that this could potentially have the negative outcome of stunting

economic growth as smaller employers limit the size of their businesses to avoid their employees' qualifying for CCMA access. Another respondent focused on the fact that this would largely exclude the category of domestic and farm workers. He argued that recent history has seen substantial enhancement of the rights of domestic and farm workers and that this limitation would be a backward step.

The issue of length of service being used as a qualifying criterion was also universally rejected. One respondent said "you can be abused from day one, why make someone wait for six months before he can challenge this abuse". The criterion of limiting access to employees whose earnings were below a certain threshold did gain some support. One comment made in favour of the exclusion of higher income earners is that they generally tend to take their matters to the Labour Court in any event, so why not go to the Labour Court or opt for private arbitration from the outset. A dissenting comment made was that higher income earners have more to lose, and when they have lost their jobs they have no resources to fund their actions, regardless of their previous earnings, so they are just as reliant on the free services of the CCMA as a lower income earner would be.

On the issue of whether an earnings threshold will actually prevent the referral of frivolous cases, the findings indicate that it is not likely to have a significant impact on the prevention of frivolous cases. Although qualification criteria are likely to prevent frivolous cases, they share the same negative consequences as the introduction of an administration fee. They may prevent frivolous cases, but they will also exclude legitimate cases.

5.2.6 The current system of review should be amended

The first round interviews saw many of the respondents commenting that the distinction between and understanding of appeal and review processes have become blurred, with many people seeking an appeal against CCMA rulings rather than a review thereof. The possible relationship between legal representation and the right of review was tested in the research. In the first round the suggestion was made that if legal representation were allowed, review should be limited, with the corollary that if legal representation were excluded reviews should be automatically allowed. The responses to the above were divided but in general it seems that the right of review should not be dependent on the presence or absence of legal representation. However, the respondents believe that changes to the review process would do little to reduce the number of frivolous cases referred.

5.2.7 More education provided

During the second round, a suggestion was made that general education on roles and responsibilities within the CCMA would help to reduce frivolous cases. This suggestion was further explored in round three and most respondents believe that some form of education on roles and responsibilities is likely to see a reduction in the referral of frivolous cases. Education should be encouraged. If effective it will reduce the number of frivolous cases referred and may prevent the need to explore the more punitive or exclusionary alternatives (eg administration fees, qualification criteria etc).

6 Conclusion and recommendations

The literature showed that in general the CCMA operates with a significant degree of success but that it suffers from a high number of referrals of frivolous cases (Levy & Venter 2006; CCMA Annual Report 2005/6; Benjamin & Gruen 2006). This research

has shown that in seeking to prevent frivolous cases attention needs to be paid to those interventions and changes that are not exclusionary and should enhance rather than limit rights.

The research findings indicate that the measure most likely to achieve success in preventing frivolous cases is the implementation and management of stricter screening processes. These stricter screening processes should not only evaluate the jurisdiction of the matter, as is currently the case, but also closely examine the merits of the cases being referred.

A second intervention likely to see a significant reduction in the referral of frivolous cases is the more frequent use of cost awards. Although cost awards should be limited to frivolous cases, they should be used more often and be more strictly enforced. The use of cost awards will not infringe on rights, but will go a long way towards holding those who abuse the system responsible for their actions.

The third measure identified as being likely to have a significant impact on the prevention of frivolous cases was increasing the powers of commissioners to dismiss cases at conciliation instead of simply issuing a certificate. A commissioner should be given the power to dismiss frivolous cases.

A number of other initiatives were identified as having the potential to weed out frivolous cases. These included the introduction of an administration fee, amending the restrictions on legal representation and introducing qualification criteria, most notably excluding individuals earning above a predetermined threshold. Although it was acknowledged that these initiatives would have an impact on preventing frivolous cases, they were not widely accepted as they were viewed as limiting or reducing rights.

The research also indicates that any proposed interventions should not be viewed in isolation and that a holistic view should always be taken. Underpinning any intervention is the necessity for broad-based education of all CCMA users. The education needs to cover the roles and responsibilities of all parties, including the penalties imposed for frivolous referrals.

7 Recommendations for future research

The suggested interventions presented in this report were derived from the literature and the Delphi research technique. It would be useful to test these interventions more broadly. The CCMA 2005/6 Annual Report mentions the pre-conciliation screening process and suggests that further research should be conducted on the role pre-conciliation can play in improving the screening processes and preventing frivolous cases being accepted by the CCMA. An additional area for research is the development of guidelines on the use and enforceability of cost awards

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APPENDIX 1

Results of Round Two

		Strongly agree	Agree	Neutral	Disagree	Strongly disagree	Response count
1.	The introduction of an administration / referral fee will reduce the referral of frivolous cases.	5	2	0	2	0	9
2.	Increasing the frequency and circumstances under which cost awards are made will reduce the referral of frivolous cases.	4	4	0	1	0	9
3.	Removing restrictions on legal representation will reduce the referral of frivolous cases.	2	4	2	0	1	9
4.	The introduction of qualifying criteria will reduce the referral of frivolous cases.	1	7	0	1	0	9
5.	The introduction of stricter and more rigorous screening processes will reduce the referral of frivolous cases.	5	4	0	0	0	9
6.	Greater powers should be given to conciliators to dismiss frivolous cases at the conciliation stage.	3	5	0	0	1	9
7.	A standard referral fee of R80.00 should be introduced for any individual to refer a matter to the CCMA.	3	2	0	2	2	9
8.	Cost awards should only be awarded where abuse is evident e.g. frivolous and vexatious cases.	5	2	1	1	0	9
9.	Lawyers should be allowed in conciliation hearings.	1	2	2	1	3	9
10.	Lawyers should be allowed in all arbitration hearings (including those relating to dismissals for misconduct and performance) as a matter of course.	4	2	1	0	2	9
11.	In the UK, an employee must be employed for 12 months before they are eligible to refer a dispute (except in the case of discrimination or harassment in which case there is no restriction). A similar criterion should be introduced in South Africa.	0	0	0	5	4	9
12.	Individuals earning greater than a predetermined threshold (e.g. R700,00.00 per annum) should be excluded from the CCMA and must refer disputes to private arbitration or to the Labour Court.	2	5	1	0	1	9
13.	A fee equivalent to 5% of the applicant's last salary should be introduced. If the matter is ruled to have merit (regardless of whether it is won or lost), the fee will be refunded on conclusion of the matter.	3	1	1	2	2	9
14.	Cost awards should follow results i.e. automatically be made to the losing party.	0	2	2	4	1	9

15.	Lawyers should only be allowed in technically complex matters. (If this were to be the case, the criteria of what constitutes a technically complex matter would have to be defined.)	2	0	2	5	0	9
16.	If lawyers are not allowed in arbitration process, there should be an automatic right to review.	0	4	0	5	0	9
17.	If lawyers are allowed in all arbitration proceedings, the right to review should be limited to defects as defined in the Labour Relations Act (e.g. commissioner misconduct, gross irregularity of the proceedings, commissioner exceeded his/her powers, the award has been improperly obtained).	2	2	3	2	0	9
18.	Referrals must be made in person and evaluated by a skilled dispute resolution specialist prior to being accepted by the CCMA.	3	2	1	3	0	9
19.	The CCMA should be available to all regardless of earnings and no maximum earnings threshold should be introduced.	0	1	1	4	3	9
20.	No administration / referral fee should be payable to refer a matter to the CCMA.	1	2	1	3	2	9
21.	If unrestricted legal representation is allowed, cost awards should automatically be awarded to the losing party.	1	0	2	6	0	9
22.	If an administration / referral fee were introduced, a means test must also be included. Where the requirements of the means test are not met, the administration / referral fee will be waived.	1	4	3	1	0	9
23.	Individuals earning in excess of a predetermined threshold (e.g. R700,000.00 per annum) may refer the matter to the CCMA, but cost awards will automatically be awarded to the losing party.	1	0	1	5	2	9
24.	The conciliation and arbitration process should focus less on procedure and more on fairness and reasonableness.	1	4	0	4	0	9
25.	Individuals believe that trade union membership entitles them to a CCMA case so all matters are referred, regardless of the merits.	3	4	1	1	0	9
26.	There is a commonly held belief amongst employees that you can "extort"; 2 - 3 months' salary from your employer through the CCMA at no cost to yourself.	5	1	3	0	0	9
27.	The high levels of unemployment in South Africa exacerbate the abuse of the CCMA as individuals are desperate for any income.	2	4	3	0	0	9
28.	Con-arb should be the only dispute resolution process utilised by the CCMA.	1	0	0	5	3	9
29.	Con-arb should be conducted on one day with the one process following immediately after the other, but the processes should be conducted by different commissioners.	1	2	0	5	1	9

APPENDIX 2

Responses to Round Three

	More likely	Likely	Less likely	Total responses
Better education of employers and employees of their roles and responsibilities within the CCMA will lead to less frivolous CCMA referrals.	2	5	1	8
Better education of trade union members of their roles and responsibilities within the CCMA will lead to less frivolous CCMA referrals.	2	4	2	8
Holding trade unions responsible for frivolous cases referred by their members will reduce the number of frivolous CCMA referrals.	5	1	2	8
Stricter screening processes by skilled dispute resolution specialists will reduce the number of frivolous CCMA referrals.	7	1	0	8
Eliminating the con-arb process will reduce the number of frivolous CCMA referrals.	1	1	6	8
Requiring that all urban CCMA referrals be made in person will reduce the number of frivolous CCMA referrals.	1	4	3	8
Introducing an administration fee (with an appropriate means test) will reduce the number of frivolous CCMA referrals.	5	3	0	8
The stricter, more frequent and more enforced use of cost awards for frivolous matters will reduce the number of frivolous CCMA referrals.	6	1	1	8
Allowing legal representation in all arbitration hearings will reduce the number of frivolous CCMA referrals.	1	4	3	8
The introduction of an earnings threshold will reduce the number of frivolous CCMA referrals.	1	4	3	8
The limiting of the cases under which a respondent may review a case will reduce the number of frivolous CCMA referrals.	2	1	5	8
Increasing the powers of the Conciliation Commissioner to dismiss frivolous cases will reduce the number of frivolous CCMA referrals.	6	0	2	8
	answered question			8
	skipped question			0

APPENDIX 3

Ranking of the responses to the third round questionnaire

Stricter screening processes by skilled dispute resolution specialists will reduce the number of frivolous CCMA referrals.	23
The stricter, more frequent and more enforced use of cost awards for frivolous matters will reduce the number of frivolous CCMA referrals.	21
Introducing an administration fee (with an appropriate means test) will reduce the number of frivolous CCMA referrals.	21
Increasing the powers of the Conciliation Commissioner to dismiss frivolous cases will reduce the number of frivolous CCMA referrals.	20
Holding trade unions responsible for frivolous cases referred by their members will reduce the number of frivolous CCMA referrals.	19
Better education of employers and employees of their roles and responsibilities within the CCMA will lead to less frivolous CCMA referrals.	17
Better education of trade union members of their roles and responsibilities within the CCMA will lead to less frivolous CCMA referrals.	16
Requiring that all urban CCMA referrals be made in person will reduce the number of frivolous CCMA referrals.	14
Allowing legal representation in all arbitration hearings will reduce the number of frivolous CCMA referrals.	14
The introduction of an earnings threshold will reduce the number of frivolous CCMA referrals.	14
The limiting of the cases under which a respondent may review a case will reduce the number of frivolous CCMA referrals.	13
Eliminating the con-arb process will reduce the number of frivolous CCMA referrals.	11