

The effectiveness of conciliation as an alternative dispute  
resolution process in unfair dismissal disputes

By Colleen Blignaut

A mini dissertation in partial fulfilment of the degree

LLM Labour Law (course work)

Faculty of Law

University of Pretoria

Supervisor: Prof Monray Marsellus Botha

## Abstract

In its preamble, the LRA provides that one of its aims is to change the law governing labour relations by, amongst other means, promoting simple procedures for the resolution of labour disputes. The Commission for Conciliation, Mediation and Arbitration (hereafter referred to as the CCMA) was created during 1996.<sup>1</sup> It was expected that the CCMA would have to deal with an average of 30 000 referrals nationally per year. However, it quickly became apparent that this was a gross underestimation. During the 1997/1998 reporting period, the CCMA reported that it had received 67 319 referrals. The number of referrals has continued to increase yearly, with 154 279 referrals having been received during the 2010/2011 reporting period. This trend has continued, with the CCMA for the reporting period of 2015/2016 reporting 179 528 referrals.<sup>2</sup>

The process of the referral of a dispute to the CCMA or any other dispute resolution council was engineered to be uncomplicated and cost efficient for the CCMA to be accessible to everyone, and to give effect to Section 23 of the Constitution.<sup>3</sup>

The CCMA strives for any person who has a labour dispute to be able to refer the matter to the CCMA, without requiring costly legal representation. However noble the intention for free and easy access to the CCMA may be, the limited consequences associated with dishonesty or abuse in the forum has resulted in cases of misuse by employees and reluctance by the employer to participate in pre-arbitration processes.<sup>4</sup>

In order to give effect to the constitutional ideologies through the conciliation and making the referral process of dismissal law available to dismissed employees free of charge<sup>5</sup>, the CCMA has provided a forum for employees to ventilate disputes with their

---

<sup>1</sup> Section 1(d)(iv) of the Labour Relations Act 66 of 1995.

<sup>2</sup> Bhorat "Understanding the efficiency and Effectiveness of the Dispute Resolution System in South Africa: An analysis of the CCMA Data" 2007 University of Cape Town, DPRU. 12.

<sup>3</sup> The Constitution of the Republic of South Africa, 1996.

<sup>4</sup> *Rose Ramchou v Ackermans* (NP856-01).

<sup>5</sup> Brand, Lotter, Steadman & Ngcukaitobo 15.

employers on an equal footing. To reach a mutually acceptable agreement between the parties.

However honourable the intentions of the CCMA may be in providing and facilitating the process of conciliation in disputes of alleged unfair dismissal, it is not immune to being abused by parties who may not have the best of intentions when referring a dispute to the CCMA in the first place.

This study aims to identify the possible shortcomings of the conciliation process at the CCMA by comparing it to a similar process used in the United Kingdom provide proposed recommendations for conciliation in disputes based on allegations of unfair dismissal, remain effective in South Africa.

## Acknowledgements

I would like to extend my gratitude and thanks to the following people for assisting me in getting one step closer to realising my dream.

I must first thank God for having his hand upon me, guiding me and giving me the confidence to complete the research.

My husband Chris who had to make many sacrifices and endure my constant anxieties of not being able to complete the research on time.

My partner in crime, Cherise for all the moral and emotional support and being the sister that never had. Marozane, middle earths resident word magician, thank you for working your magic in helping pull the rabbit out of the hat.

My loving parents Percy and Jacie for their strong moral support and encouragement during the course of my studies.

Lastly my supervisor, Professor Monray Marsellus Botha. His encouraging during the initial and final stages of the study re-enforced my motivation and boosted my confidence to complete the dissertation when I felt like giving up. He ensured that I did not deviate from the topic and assisted me greatly with invaluable information to help complete the dissertation.

# Table of Contents

Abstract.....	i
Acknowledgements.....	i
Table of Contents.....	ii
Chapter 1 - Introduction .....	1
1. Background and problem statement.....	1
2. History of labour law in South Africa. ....	3
a) The position of labour law prior to apartheid and during the apartheid era .....	4
b) South African labour law in a democratic era .....	7
3. Research Objective .....	10
4. Significance of the study.....	10
5. Research Methodology.....	11
6. Proposed Structure .....	11
7. Conclusion .....	12
Chapter 2 - The development of Conciliation as a process of Alternative Dispute Resolution for dismissal law in the South African.....	13
1. Introduction .....	13
2. Where does labour conciliation come from in South Africa? .....	14
3. Giving effect to the Constitutional ideologies through alternative dispute resolution .	16
a) Efficiency .....	17
b) Informality .....	17
c) Accessibility .....	18
d) Specialised knowledge of decision makers .....	18
e) Costs associated with alternative labour dispute resolution.....	19
4. Conciliation as part of Alternative Labour Dispute Resolution in South Africa.....	20
5. The process of conciliation in labour disputes at the CCMA: .....	21
6. The function of the conciliator during the process of conciliation:.....	26

7. Confidentiality at conciliation proceedings .....	28
8. Conclusion .....	29
Chapter 3 - Problems related to conciliation as an alternative dispute resolution process in dismissal cases.....	31
1. Introduction .....	31
2. The following problems have been identified in the conciliation process at the CCMA: 31	
a) Lack of legal knowledge.....	31
b) Legal uncertainty as to concepts of fairness in dismissal law. ....	33
c) Lack of consequences for unwillingness to participate in conciliation. ....	33
d) Abuse of the alternative dispute resolutions procedures at the CCMA. ....	34
e) Negative effect on legal development. ....	36
3. Conclusion .....	36
Chapter 4 - Conciliation in the United Kingdom.....	38
1. Introduction .....	38
2. Background to UK labour development. ....	38
3. The role of ACAS in dispute resolution: .....	40
4. The role of the Employment Tribunal in alternative dispute resolution .....	40
5. Alternative dispute resolution in South Africa as compared to that of the United Kingdom.....	42
6. Conclusion .....	44
Chapter 5 – Recommendations and conclusion .....	45
1. Introduction .....	45
2. Recommendations .....	45
3. Conclusion .....	48
Bibliography .....	51

# Chapter 1 - Introduction

## 1. Background and problem statement

The Constitution<sup>6</sup> provides in section 23 that everyone has the right to fair labour practices. 'Everyone' includes employees, as well as employers. This right has been given effect to by enacting regulatory acts of parliament, one of which is the Labour Relations Act 66 of 1995.<sup>7</sup>

In its preamble, the LRA provides that one of its aims is to change the law governing labour relations by, amongst other means, promoting simple procedures for the resolution of labour disputes. This is to be done through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration was established), as well as through independent alternative dispute resolution services accredited for that purpose.<sup>8</sup>

The Commission for Conciliation, Mediation and Arbitration (hereafter referred to as the CCMA) was created during 1996.<sup>9</sup> It was expected that the CCMA would have to deal with an average of 30 000 referrals nationally per year.<sup>10</sup> However, it quickly became apparent that this was a gross underestimation. During the 1997/1998 reporting period, the CCMA reported that it had received 67 319 referrals.<sup>11</sup> The number of referrals has continued to increase yearly, with 154 279 referrals having been received during the 2010/2011 reporting period.<sup>12</sup> This trend has continued, with the CCMA for the reporting period of 2015/2016 reporting 179 528 referrals.<sup>13</sup> This translates to an average of 721 matters being referred to

---

<sup>6</sup> Constitution of the Republic of South Africa, 1996 (hereafter referred to as the South African Constitution).

<sup>7</sup> Hereafter 'the LRA'.

<sup>8</sup> Section 1(d)(iv) of the Labour Relations Act 66 of 1995.

<sup>9</sup> Section 112 of Act 66 of 1995.

<sup>10</sup> Borat "Understanding the efficiency and Effectiveness of the Dispute Resolution System in South Africa: An analysis of the CCMA Data" 2007 University of Cape Town, DPRU. 12.

<sup>11</sup> Borat 12.

<sup>12</sup> Borat 12.

<sup>13</sup> The CCMA Annual Report 2015/2016 (available at <http://www.ccma.org.za>) 19.

the CCMA daily, and excludes any matters that are dealt with by any other dispute resolution bodies, bargaining councils, the labour court, and the labour appeal court.<sup>14</sup> The dramatic increase in referrals is indicative of the troubling state of the South African labour market. The current slow economic growth has resulted in the persistence of increased numbers of unemployment. This places further pressure on the already sensitive labour market as well as legal dispute management instruments such as the CCMA.<sup>15</sup>

Even though the LRA makes provision for most disputes to be referred to the CCMA for attempted conciliation, it is estimated that 80% of all matters referred to the CCMA are based on dismissal disputes.<sup>16</sup> It is for this reason that this paper focuses on referrals based on allegations of unfair dismissal.

The process of the referral of a dispute to the CCMA or any other dispute resolution council was engineered to be uncomplicated and cost efficient for the CCMA to be accessible to everyone, and to give effect to Section 23 of the Constitution.<sup>17</sup> The CCMA strives for any person who has a labour dispute to be able to refer the matter to the CCMA, without requiring costly legal representation.<sup>18</sup> However noble the intention for free and easy access to the CCMA may be, the limited consequences associated with dishonesty or abuse in the forum has resulted in cases of misuse by employees and reluctance by the employer to participate in pre-arbitration processes.<sup>19</sup> Even though the commissioner may make an order as to costs on arbitration as long as such an award is in line with the code of good practice issued by the National Economic Development and Labour Council<sup>20</sup> or any other relevant

---

<sup>14</sup> The CCMA Annual Report 2015/2016 (available at <http://www.ccma.org.za>) page 19.

<sup>15</sup> *Ibid.*

<sup>16</sup> Benjamin "Conciliation, Arbitration and Enforcement: The CCMA's achievements and challenges" 2009 ILJ page 26.

<sup>17</sup> The Constitution of the Republic of South Africa, 1996.

<sup>18</sup> *CCMA v The Law society of the Northern Provinces* (005/13) ZASCA 118.

<sup>19</sup> In *Rose Ramchau v Ackermans* (NP856-01) the Commissioner awarded costs to the employer on the grounds that the applicant "dragged the company to the CCMA for an utterly hopeless case ... the services of this statutory body should be utilised for genuine disputes and never as a playing field for petty vindictive disputes by parties bent on settling old scores".

<sup>20</sup> Here after referred to as 'NEDLAC'.

guidelines provided for by the commission itself,<sup>21</sup> such awards are exceptional and only applicable to matters manifestly futile or vexatious.<sup>22</sup>

Due to the reluctance of awarding cost orders against vexatious claimants, it has become very tempting for disgruntled employees to abuse the system in the hope of making money or avoiding the consequences of fair disciplinary action being taken against them at the expense of the employer and the CCMA. Should the employer choose to defend its reasoning with regards to such fairness, it may result in lengthy litigation and immense legal costs increasing the financial risk of the employer.<sup>23</sup>

Due to the added responsibilities associated with substantive and procedural fairness in dealing with disciplinary action against employees, coupled with the uncertainty associated with fairness of disciplining employees, and South Africa entering economic recession in the first quarter of 2017,<sup>24</sup> it may prove beneficial for employers to be provided with structured guidance as to what is expected of them in terms of disciplinary actions against employees, instead of the hit and miss strategy currently employed.

In the practical experience of the author, it has become apparent that often employers feel forced into settlement at conciliation. This is due to economic pressures and time constraints, as well as their inexperience and lack of expertise in the laws that protect them, and their inability to afford possible litigation, at the expense of developing dismissal law.

## **2. History of labour law in South Africa**

---

<sup>21</sup> Section 138(10) of the Labour Relations Act 66 of 1995.

<sup>22</sup> *Ntombela v SMT Health Solutions* (KNDB10811-08).

<sup>23</sup> Israelstam "There is a significant number of referrals based on facts that are mis-represented" in *The South African labour guide* available at <http://bit.ly/1MdTmQa> (accessed on 8 September 2017).

<sup>24</sup> "South African economy shrinks by 0.7%", available at: <http://www.statssa.gov.za/?p=9989> (accessed on 29 June 2017).

The labour sector in South Africa is a product of its troubled past based on inequality in society. To appreciate and respect the present situation, and more specifically alternative dispute resolution where it applies to dismissal law, one should appreciate the innovative evolution that has already taken place and continues to occur in our labour law in order to keep up with individual diversity. By looking at the position prior to 1994, as compared to the current position, the aim is to paint a holistic picture of the development of labour law in South Africa.<sup>25</sup>

a) The position of labour law prior to apartheid and during the apartheid era

Western law dominated the South African legal system, and has done so since the Roman Dutch laws were forced onto the pre-existing legal systems of the indigenous people who occupied the western cape regions prior to colonialism. This occurred even though the foreign laws were never really accepted by the indigenous people as they had no desire to receive these laws.<sup>26</sup>

At the turn of the eighteenth century, the British took occupation of the Cape under a treaty of cession with the Netherlands. The new colonial authorities perceived the local law to be Roman Dutch law and did not recognize the laws of the indigenous people.<sup>27</sup> During the first few decades of the twentieth century, after the discovery of gold and diamonds in South Africa, a period of industrialisation took place. This meant that human labour through the mechanising of previously labour intensive tasks caused the labour market to revolt.<sup>28</sup> It was during this time that South Africa embarked on a gradual development from being an agrarian, mostly rural society, to that of a rapidly evolving industrial society.<sup>29</sup> However, the transition was not without its challenges. Apart from the clashes between employees which were seen as normal in the working environment with such a

---

<sup>25</sup> Van Niekerk, et al. "Law@work" 2015 Third Edition, Lexis Nexis, page 11.

<sup>26</sup> Van Niekerk "The Plurality of Legal Domains in South Africa: The States Historical Legislative Intrusion into the Field of Urban Popular Justice and Customary Law" in Scharf and Nina (eds) "The outer law: Non-State Ordering in South Africa" 2001, Juta, Lansdowne page 14.

<sup>27</sup> Van Niekerk page 15.

<sup>28</sup> Van Niekerk, et al. "Law@work" 2015 Third Edition, Lexis Nexis, page 11.

<sup>29</sup> Basson, et al. "Essential Labour Law, Fifth Edition, Labour Law Publications, 2009 page 4.

large work force, clashes between worker groups also persisted. The reason for such conflicts were attributed to one group of workers feeling threatened by the actions of another group and invariably the conflict became racially motivated.<sup>30</sup>

The Industrial Conciliation Act of 1924 was a direct response to the Rand Revolt, a revolt of mine workers in 1922. This legislation entrenched racial discrimination and the categorisation of racial groups, which challenged the employers in exercising their common law power to hire and fire employees at will, as it was during this time that the appointment of white skilled workers became redundant due to the mechanising of the mining industry, allowing for the appointment of cheaper, unskilled black employees.<sup>31</sup>

The Industrial Conciliation Act<sup>32</sup> brought into existence an industrial council system that would be self-regulatory, a system that was statutorily recognized and could be enforced by criminal sanction. However, this act would only apply to white workers.<sup>33</sup> During 1934, the Van Reenen Commission compiled a report based on the labour environment in South Africa at that time. The commission was mainly concerned with the Industrial Conciliation Act<sup>34</sup> and the Wage Act of 1925.<sup>35</sup> In 1937 an amended version of the Industrial Conciliation Act was promulgated, but it remained in keeping with the ideals of segregation or 'apartheid', as it would later become known.

The primary aim of the Industrial Conciliation Act<sup>36</sup> was to protect the interests of white workers, both skilled and unskilled. Employees of colour, although not entirely omitted from the legislation, were essentially excluded from the working of the legislation. With trade unions being actively discouraged, workers of colour did not have the benefit of collective bargaining in the form of industrial councils.<sup>37</sup>

---

<sup>30</sup> *Ibid.*

<sup>31</sup> Du Toit "Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law" 2008 125 SALJ 95; Basson, *et al.* page 4.

<sup>32</sup> Act 11 of 1924.

<sup>33</sup> Van Niekerk et al Law@work, Third Edition, Lexis Nexis, 2015 page 11.

<sup>34</sup> Act 11 of 1924.

<sup>35</sup> Act 27 of 1925.

<sup>36</sup> Act 11 of 1924.

<sup>37</sup> Basson, *et al.* page 5.

By the 1950's, in an attempt to mitigate the looming industrial conflict and give adherence to the rights of workers of colour, separate legislation such as the Black Labour Relations Regulation Act,<sup>38</sup> provided for the establishment of representative bodies for workers of colour. These committees would be used as a method of communication between the employees and their primarily white employers.<sup>39</sup> Despite the employers' attempts at undermining the establishment of trade unions, these trade unions continued to exist and grow in popularity in the unskilled work force, which was predominantly of colour.

The Industrial Conciliation Act<sup>40</sup> was rewritten during the mid- 1950's and promulgated during 1957, reflecting the government's racist policies by providing that certain jobs would only be available to whites, and measures were put in place to separate non-racial unions from that of white unions.<sup>41</sup> By the mid 1970's trade unions were considered to be major role players in the work place, exercising considerable force on the employers. With the increase in majority black trade unions, resulting in conflict and both national and international pressure, a commission of inquiry was appointed. The commission later became better known under the name of its chairperson, Professor Nic Wiehahn.<sup>42</sup>

The Wiehahn commission was tasked with making recommendations concerning the labour legislation of the time.<sup>43</sup> The sudden willingness to allow for legislative change was what was later termed as the 1973 'labour unrest', during which trade unions representing people of colour rejected the racist legislation outright, and attempted rather to negotiate non-statutory recognition agreements in order to establish bargaining structures.

The Wiehahn commission concluded that due to the sudden economic growth experienced during the late 1960's and the rapid rate at which industrialisation took

---

<sup>38</sup> Act 48 of 1953.

<sup>39</sup> Basson, *et al.* page 5.

<sup>40</sup> Act 28 of 1956

<sup>41</sup> Van Niekerk, *et al.* page 11.

<sup>42</sup> Basson, *et al.* page 5.

<sup>43</sup> Van Niekerk, *et al.* page 11.

place, the demand for skilled labour had resulted in employees of colour being moved into more skilled occupations which in the past would have been filled by white employees. This had taken its toll on the racially exclusive industrial council system. The commission exposed the restrictive nature of the Black Labour Relations Act<sup>44</sup>, which only allowed for limited powers to be provided to the workplace committees of employees of colour.<sup>45</sup>

The Wiehahn commission issued a report during 1979 which was incorporated into the amendments made to the Industrial Conciliation Act of 1956. These amendments gave rise to the expansion of the trade unions' rights to include black employees, the concept of unfair labour practices, and the creation of the Industrial Court.<sup>46</sup> This was the first step in the direction of labour legislation, allowing for the concept of unfair pre- termination procedures. This has developed into what is now known as disciplinary action.<sup>47</sup>

The Industrial Court was established during 1980 as a specialised court to deal mainly with labour related disputes. The Industrial Court had jurisdiction to determine unfair labour practices. As such it provided what fair disciplinary procedures were at the time.<sup>48</sup>

#### b) South African labour law in a democratic era

A new era of democracy was ushered in in 1994, based on constitutionalism rather than statism. A new political dispensation was inaugurated, resulting in the adoption of the Interim Constitution of 1993 and later in 1996, the final Constitution of the Republic of South Africa.<sup>49</sup> Among the first legislative initiatives consented to by parliament, was the revision of the Industrial Conciliation Act,<sup>50</sup> through the

---

<sup>44</sup>Act 48 of 1953.

<sup>45</sup>Basson, *et al.* page 5.

<sup>46</sup>Van Niekerk, *et al.* page 12.

<sup>47</sup>Van Niekerk, *et al.* page 13.

<sup>48</sup>Le Roux and van Niekerk "The South African Law of Unfair Dismissal", Second edition, Juta & Co, 1994 pages 18-25.

<sup>49</sup>Basson, *et al.* page 8.

<sup>50</sup>Act 28 of 1956.

appointment of a tripartite team under the lead of Professor Halton Cheadle. With the enactment of the interim Constitution, labour rights were included in the Bill of Rights, which created new imperatives for the regulation of the labour market.<sup>51</sup>

The team led by Professor Halton Cheadle identified various problems with regards to the 1956 Act. For the purposes of this paper the following short comings were identified:<sup>52</sup>

- The conciliation processes were wholly ineffective.<sup>53</sup>
- The expensive nature of the dispute resolution system.<sup>54</sup>
- The jurisprudence of disputes of right were in some cases inconsequential or even contradicting.<sup>55</sup>
- The adjudication of disputes of interest were left unadjudicated by the Industrial Court.<sup>56</sup>

The Cheadle task team established that the dispute resolution procedures provided for in the 1956 Act were too lengthy, complex and technical for it to remain effective in the new constitutional dispensation. In light of recommendations made by the Cheadle team, a legislative map was created in order to facilitate the drafting of new legislation, as it was concluded that the Industrial Conciliation Act had become completely unworkable under the constitutional command.<sup>57</sup> Accordingly, the old Labour Relations Amendment Act<sup>58</sup> was replaced by the Labour Relations Act of 1995 (the LRA).<sup>59</sup>

---

<sup>51</sup> Van Niekerk, *et al.* page 12.

<sup>52</sup> Explanatory Memorandum (1995) 16 ILJ.

<sup>53</sup> Explanatory Memorandum (1995) 16 ILJ at 281.

<sup>54</sup> Explanatory Memorandum (1995) 16 ILJ at 281.

<sup>55</sup> Finnemore "Introduction to Labour Relations in South Africa" 2006 Ninth Edition, LexisNexis page 33.

<sup>56</sup> Du Toit, *et al.* "Labour Relations Law: A comprehensive guide" Sixth Edition 2015 LexisNexis page 11.

<sup>57</sup> Act 66 of 1995.

<sup>58</sup> Act 9 of 1991.

<sup>59</sup> Act 66 of 1995.

By including the right to fair labour practices into the Bill of Rights of the Interim Constitution,<sup>60</sup> a duty was placed not only on the state to ensure that these rights are respected, but on every person involved in a labour relationship to implement it. The pressure to facilitate a change in labour regulation became intensified with the re-joining of South Africa to the International Labour Organisation, not only resulting in the world keeping a close eye on the legislative progress, but also the requirement of national legislation reflecting the provisions of international law in the form of the core conventions of the International Labour Organisation.<sup>61</sup>

Less than a year after South Africa had its first democratic election in February of 1995, a negotiating document was released by the Cheadle task team and after some negotiation an agreement was reached between the social partners.<sup>62</sup> The Bill was introduced to parliament during November 1995 and came into operation on the 11<sup>th</sup> of November 1996. The speed at which the dream of effective change and establishing comprehensive legislation was created and promulgated reflects the dire need for the evolution of the regulation of labour force after Apartheid.

On the 16<sup>th</sup> of December 1996, the final Constitution of the Republic of South Africa<sup>63</sup> was enacted, replacing the Interim Constitution (hereafter referred to as the Constitution).<sup>64</sup> The Constitution had a profound effect on all branches of South African law in providing that all other law is subservient to it.<sup>65</sup> Chapter 2 of the Constitution, the Bill of Rights, has provided several provisions that directly impact the labour relationship. Specifically providing for a right to fair labour practices in Section 23 of the Constitution and deals specifically with labour relations, with Section 23(1) states that “Everyone has the right to fair labour practices.”

This right awarded to everyone has been given effect, as was the case of its predecessor Section 27 of the Interim Constitution,<sup>66</sup> through various legal

---

<sup>60</sup> Section 27 of the Interim Constitution.

<sup>61</sup> Basson, *et al.* page 8.

<sup>62</sup> Van Niekerk, *et al.* page 13.

<sup>63</sup> The Constitution of the Republic of South Africa, 1996.

<sup>64</sup> The Constitution of the Republic of South Africa, 1996.

<sup>65</sup> Section 8 of the Constitution of the Republic of South Africa, 1996.

<sup>66</sup> Interim Constitution Act 200 of 1993.

mechanisms, however for the current study the LRA remains the most relevant. The LRA, in giving effect to this constitutional right, has devoted its Chapter VII to dispute resolution, through which the Commission for Conciliation, Mediation and Arbitration has been created. This chapter in the LRA is followed by Chapter VIII which specifically regulates unfair dismissals and unfair labour practices, forming the basis of this study based on alternative dispute resolution in dismissal law.

The LRA, has not remained stagnant in its development and it has undergone some significant changes since its promulgation in 1995, with amendments being made during 1998, 2002 and 2014. The latest amendments focus on the status of employees who are not engaged in permanent employment relationships and the regulation of temporary work.<sup>67</sup> It is expected that the LRA will continue evolving and developing in order to keep up to the constant changes associated with employment relationships. Due to the personal nature of discipline in the workplace, the development of law remains ongoing and is it not only on the legislature to effectively effect development, but it is the responsibility of the judiciary and executive branches of government as well. The current system of labour dispute resolution includes both alternative dispute resolution as well as adjudication, which are at the helm of the direction that the development will take.

### **3. Research Objective**

The aim of the study is to critically evaluate the effectiveness of conciliation as a form of alternative dispute resolution in disputes of unfair dismissal by focusing the study on the provisions of the LRA, the rules of the CCMA, and the labour courts where conciliation is statutorily required.

### **4. Significance of the study**

Conflict is a common occurrence in the workplace, not only is it inevitable but also necessary for the development of our law. Through continued assessment of the

---

<sup>67</sup>Van Niekerk et al Law@work, Third Edition, Lexis Nexis, 2015 page 15.

effectiveness of systems and processes associated with the ever-changing employment relationship, proposals may be made of how to strengthen and improve the system in the future.

Through this research, the researcher aims to challenge the myths associated with alternative dispute resolution in dismissal law by focusing specifically on the process of conciliation and attempting to provide recommendations for the manner in which referrals based on dismissal law are dealt with at the CCMA or any other alternative dispute resolution bodies.

## **5. Research Methodology**

This dissertation draws from primary sources, such as the Constitution of the Republic of South Africa,<sup>68</sup> conventions and recommendations of the International Labour Organisation,<sup>69</sup> South African Acts of Parliament, and judgments of the South African Courts. Secondary sources drawn from include published writings of South African and foreign academics, repealed legislation, and reports of the Commission of Conciliation, Mediation and Arbitration.

The researcher will review and interpret relevant published and unpublished information that is available on this topic in order to synthesise the information and provide an overview of the current legal position in alternative dispute resolution with reference to dismissal law through identifying difficulties experienced in the procedures.

## **6. Proposed Structure**

Chapter 1 Introduction

Chapter 2 The development of Conciliation as a process of Alternative Dispute Resolution for dismissal law in the South African.

---

<sup>68</sup> Constitution of the Republic of South Africa, 1996.

<sup>69</sup> Hereafter referred to as the 'ILO'.

Chapter 3 Problems related to conciliation as an alternative dispute resolution process in dismissal cases.

Chapter 4 Conciliation in the United Kingdom

Chapter 5 Conclusion and recommendations

South Africa is only now in its 23<sup>rd</sup> year of democracy. Being a very young democracy, our legislation still has a long way to go in order for it to be consistent with international standards and effectively provide South Africans with the rights and freedoms encapsulated in the Constitution.

In recent years South Africa has faced many hurdles on its road to political, social and economic transformation and it comes as no surprise that the labour market has been greatly impacted by these developments. It is for this reason that we are necessitated to re-evaluate the efficiency of the South African labour dispute resolutory mechanisms.

This paper will deal with the effectiveness of conciliation as the compulsory first stage of labour dispute resolution in South African. In order to contribute to a more desirable and constructive dispute resolution as it has been envisaged in the LRA.

# **Chapter 2 - The development of conciliation as a process of Alternative Dispute Resolution for dismissal law in the South African.**

## **1. Introduction**

The employment relationship between the employer and the employee is a profoundly personal relationship, based on trust and mutual respect accordingly emotions and personal perceptions may lead to disputes and conflict.<sup>70</sup> Conciliation is a process through which a neutral third party assists the parties in dispute to arrive at a mutually acceptable and binding solution.<sup>71</sup> This process is brought about in one of two ways, either through agreement between the parties in the form of private conciliation, or through legislative intervention in the form of statutory intervention.<sup>72</sup>

The process of alternative dispute resolution in South Africa is characterised by a two-legged approach to alternative dispute resolution with the starting point remaining the same, namely attempting self-resolution through conciliation.<sup>73</sup> It is for this reason that first and foremost the parties involved in the dispute should attempt to resolve the dispute themselves before the matter may be referred for intervention through arbitration, adjudication or industrial action. The LRA places much value on the processes of conciliation and mediation.<sup>74</sup>

The focus of this chapter is the process of conciliation as a form of alternative dispute resolution. By discussing the historical development of conciliation in South African labour law, addressing how the constitutional ideologies of Section 23 of the

---

<sup>70</sup> Nel, et al. "South Africa Employment Relations: Theory and Practice" 2002 Van Skaiks Publishers, page 7.

<sup>71</sup> Bosch, *et al.* "Conciliation and Arbitration Handbook: A Comprehensive guide to labour dispute resolution procedures" 2004 LexisNexis page 11.

<sup>72</sup> Bosch, *et al.* page 12.

<sup>73</sup> Bosch, *et al.* page 46.

<sup>74</sup> Section 135 of the Labour Relations Act 66 of 1995.

Constitution<sup>75</sup> are given effect through conciliation. After providing the background to process of conciliation the process of conciliation in the CCMA will be discussed.

## **2. Where does labour conciliation come from in South Africa?**

The process of conciliation is not a new concept in the South African labour environment. The 1956 Labour Relations Act provided for statutory conciliation through industrial councils and conciliation boards.<sup>76</sup> In terms of this legislation, certain types of disputes could be referred to the Department of Labour or the Minister of Manpower, as it was known at the time for conciliation. The conciliation process was facilitated through the creation of a conciliation board consisting of equal members of employer and employee representatives, with the conciliator being appointed by the department or the council. However, the conciliation process under the 1956 LRA was found to be ineffective, lengthy, and riddled with technicalities.<sup>77</sup>

With the inclusion of the right to fair labour practices as part of both the interim and the final constitutions, South Africa re-joining the ILO in 1994, and all the amendments to the legislation in 1979, it left the 1956 LRA largely as an unworkable piece of legislation in the new South African context, based on constitutional democracy. The new 1995 LRA gives effect to the supreme Constitution, which is founded on principles of human dignity, equality and human rights,<sup>78</sup> as well as the creation of the Commission for Conciliation Mediation and Arbitration as an independent commission tasked with resolving labour disputes through means other than adjudication.<sup>79</sup> The creation of the CCMA brought about the creation of statutory or compulsory alternative dispute

---

<sup>75</sup> The Constitution of the Republic of South Africa, 1996.

<sup>76</sup> Section 1 of the Labour Relations Act 28 of 1956, as amended by the Industrial Conciliation Amendment Act 94 of 1979.

<sup>77</sup> Bosch, *et al.* "Conciliation and Arbitration Handbook: A Comprehensive guide to labour dispute resolution procedures" 2004 LexisNexis page 49.

<sup>78</sup> The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, national common voters roll, regular elections and a multi-party system of democratic

<sup>79</sup> Section 114 of the Labour Relations Act 66 of 1995.

resolution. However, the creation of the CCMA does not prohibit the functioning of private alternative dispute resolution bodies.

The LRA, in its long title, makes it apparent that the intention of the legislature through the creation of the CCMA and bargain councils was that there should be a symbiotic relationship between statutory and private systems of alternative dispute resolution.<sup>80</sup> The practical application of this provision has however created some uncertainty in practice.

The LRA does not appear to want to replace private dispute resolution institutions with the CCMA, and parties who have existing relationships with private dispute resolution institutions through collective agreements or who have agreed on private dispute resolution are encouraged to continue making use of these institutions. This is done by implementing penalties should the parties not honour their agreements and refer matters to the CCMA, rather than make use of the applicable private dispute resolution institution not do so. It is believed that the principle motivation for this is due to the limited time, resources and money of the CCMA.<sup>81</sup>

This means that parties who have agreed to make use of private dispute resolution systems will not be able to make use the statutory system, unless the LRA specifically

---

<sup>80</sup> To change the law governing labour relations and, for that purpose —  
to give effect to section 23 of the Constitution;  
to regulate the organisational rights of trade unions;  
to promote and facilitate collective bargaining at the workplace and at sectoral level;  
to regulate the right to strike and the recourse to lock-out in conformity with the Constitution;  
to promote employee participation in decision-making through the establishment of workplace forums;  
to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;  
to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;  
to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control;  
to give effect to the public international law obligations of the Republic relating to labour relations;  
to amend and repeal certain laws relating to labour relations; and  
to provide for incidental matters.

<sup>81</sup> Brand, Lotter, Steadman & Ngcukaitobo "Labour Dispute Resolution" Second Edition 2008 Juta & Co page 24.

provides the contrary to apply to a specific type of referred dispute. This effectively reduces the costly and time-consuming duplication of procedures by lessening the workload of the CCMA with its limited resources.<sup>82</sup> Should this interpretation prove to be correct, the effect will be that statutory dispute resolution services by the CCMA should be viewed as the default option rather than rule. Only if there is no collective agreement or consensus between the parties and the nature of the dispute is characterised as arbitrable, will the CCMA attend to the dispute resolution process.

Employers and trade unions are thus discouraged from approaching the CCMA and its limited resources, as it serves no purpose to stretch the resources of the CCMA beyond what can realistically be expected.<sup>83</sup> Resulting in a financial burden that generally falls to the employer or trade union to bear, it must be asked if this can truly be said to be in line with Section 23 of the Constitution.

### **3. Giving effect to the Constitutional ideologies through alternative dispute resolution**

Any attempt to create the perfect system for dispute resolution would require certain enduring attributes to give effect to the constructional ideologies which the dispute resolution process should strive to achieve. These attributes were identified in relation to the shortcomings that were identified in the labour litigation prior to constitutionalism. The attributes chosen to focus on for purposes of this study are efficiency, informality, accessibility, the specialised knowledge of decision makers, and costs associated with alternative labour dispute resolution. These general considerations are influential in the shaping of the way in which we perceive and consider labour dispute resolution to be effective and what we expect from the system of labour dispute resolution.<sup>84</sup>

---

<sup>82</sup> Draft Negotiating Document in the Form of a Labour Relations Bill, GG 16259, 10 February 1995, pages 110-111.

<sup>83</sup> Brand, Lotter, Steadman & Ngcukaitobo page 24.

<sup>84</sup> Brand, Lotter, Steadman & Ngcukaitobo page 15.

### a) Efficiency

The existence of a labour dispute brings about the need for the matter to be resolved as quickly as possible.<sup>85</sup> Under the 1956 LRA it was seen to be a very timeous process in order for a matter to be finalised with or without the process of appeal.<sup>86</sup> This being said, there has been much criticism to the consideration of efficiency, should efficiency become the predominant consideration, and dispute resolution system may lose sight of its actual objective, that being the resolving of disputes. Losing sight of the objective as part of a holistic approach to alternative dispute resolution, may have a disastrous effect on labour relations.

The goal of efficiency should never be used as justification for disrespecting the rights and interest of the parties, no matter how tempting it may be to resolve the dispute without due regard for fairness.<sup>87</sup> As this may lead to a real possibility that decision-makers, in the interest of reaching a settlement by any means necessary, and as informally as possible, may make inappropriate procedural choices or provide suggestions which may result in even further damaging an already strained employment relationship.<sup>88</sup>

### b) Informality

Informality deals with the manner disputes are dealt with and goes hand in hand with the consideration of efficiency, as there would be no point to efficiency if the matter is plagued with slow cumbersome procedures once the matter has been referred to the appropriate forum for alternative dispute resolution.<sup>89</sup>

As soon as a matter is referred to the alternative dispute resolution forum, it should be dealt with in the most practical and effective manner, with the minimum amount of time

---

<sup>85</sup> *Ibid.*

<sup>86</sup> *Shoprite Checkers (Pty) Ltd v Ramdani N.O & others* (2000) 21 ILJ 1232 (LC).

<sup>87</sup> Brand, Lotter, Steadman & Ngcukaitobo page 16.

<sup>88</sup> *Ibid.*

<sup>89</sup> Brand, Lotter, Steadman & Ngcukaitobo page 15.

being spend on compliance with procedural formalities.<sup>90</sup> The motivation behind informality, is that ideally an aggrieved party who refers a dispute for resolution should be able to present the dispute before the decision makers unaided.<sup>91</sup> However, a question to be posed is whether these proceedings can be too informal. Due to the nature of the dispute, time is of the essence and dispute resolution institutions may be found to throw caution to the wind and carelessly do anything they perceive necessary to resolve a dispute. The decision makers and facilitators are expected to maintain a delicate balance between considerations of efficiency and informality.

To protect the consideration of informality, the Supreme Court of Appeal overturned a judgment by the North Gauteng High Court that found the Commission for Conciliation, Mediation, and Arbitration's (CCMA's) rule that limits legal representation to be unconstitutional.<sup>92</sup>

#### c) Accessibility

An alternative dispute resolution forum relies on ease of accessibility to be considered efficient. Ideally parties should be able to call upon the dispute resolution system on short notice and the institution is expected to respond promptly, as the longer the parties are left to stew about the conflict giving rise to the dispute being referred, the less likely they are to reach an amicable solution.<sup>93</sup> Still, ease of accessibility may lead to abuse of the system, which is already inundated with referrals which have little or no legal recourse.<sup>94</sup>

#### d) Specialised knowledge of decision makers

---

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *CCMA v Law Society, Northern Provinces CCMA v Law Society, Northern Provinces* (005/13) [2013] ZASCA 118 (20 September 2013).

<sup>93</sup> Brand, Lotter, Steadman & Ngcukaitobo *Labour Dispute Resolution*, Second Edition, Juta & Co, 2008, page 16.

<sup>94</sup> <http://www.labourguide.co.za/ccma-informations/158-bringing-trivial-case-to-ccma-could-cost-you> (accessed on 08 September 2017)

A tremendous burden rests on the shoulders of personnel and decision-makers of alternative dispute resolution forums such as the CCMA. They will determine the attitude of the parties towards the process.<sup>95</sup> On a broader level, the way in which personnel and decision makers perform their duties will affect the way the system of alternative dispute resolution is viewed. One of the most difficult tasks of the decision-makers in the performing of their duties, is performing them in such a way that they retain the trust of the individual employment relations parties in both themselves, as well as the entire system of dispute resolution as fair, trustworthy, efficient, accountable and unbiased.<sup>96</sup>

It is for this reason that decision-makers and facilitators, such as arbiters and conciliators, should be well-qualified and have a sound understanding of the legal framework within which they function for decisions to be lawful, fair and consistent. This should be done without losing sight of the of their goal to resolve disputes in an appropriate manner, taking into account the specific parties involved, as well as the effect that this may have on the community in the spirit of ubuntu.<sup>97</sup>

#### e) Costs associated with alternative labour dispute resolution

It is undeniable that an ideal labour dispute resolution system should not have any cost implications for the parties. However, providing these services is not free, and the funds necessary in providing the infrastructure must come from somewhere. In South Africa the CCMA is funded by the state as part of public services.

Financial implications and costs associated with referring a matter to the alternative dispute resolution bodies, such as the CCMA, is closely related to considerations of accessibility and efficiency, as discussed supra. Accordingly, there is a real danger that in attempting to give effect to these goals, the practical application thereof may result in contamination of the philosophy and objectives of the system as a whole, due

---

<sup>95</sup> Brand, Lotter, Steadman & Ngcukaitobo Labour Dispute Resolution, Second Edition, Juta & Co,2008 page 20.

<sup>96</sup> Brand, Lotter, Steadman & Ngcukaitobo Labour Dispute Resolution, Second Edition, Juta & Co,2008 page 20.

<sup>97</sup> Brand, Lotter, Steadman & Ngcukaitobo page 19.

to the limited resources available to state funded alternative labour dispute resolution bodies such as the CCMA.<sup>98</sup>

#### **4. Conciliation as part of Alternative Labour Dispute Resolution in South Africa**

There is little doubt that solutions found by the parties themselves during the process of conciliation often offer better results for the parties involved, as the solutions take into consideration the needs of the specific parties. Because conciliation focuses on the parties themselves resolving the dispute, there is a much better chance of addressing things that are important to the parties on a direct and personal level, and is more likely to keep the relationship between the parties intact.<sup>99</sup>

Considering the nature of labour disputes, South Africa along with many other international communities, have seen the need for such disputes to be dealt with expeditiously, efficiently and cost effectively. Through the creation of specialised institutions including administrative boards, tribunals and commissions, these disputes are resolved through means other than litigation.<sup>100</sup>

The role of the community has always played a vital part in the South African national identity, and in labour relations. With the iconic words of Arch Bishop Desmond Tutu remaining as true now as then:<sup>101</sup>

*“Africans believe in something that is difficult to render in English. We call it ubuntu botho. It means the essence of being human. You know when it is there and when it is absent. It speaks to humanness, gentleness, hospitality, putting yourself out on behalf of others, being vulnerable. It embraces compassion and toughness. It recognises that my humanity is bound up in yours, for we are human together.”*

---

<sup>98</sup> Brand, Lotter, Steadman & Ngcukaitobo page 20.

<sup>99</sup> Bosch, *et al.* page 47.

<sup>100</sup> Trollip “Alternative Dispute Resolution” 1991 Durban: Butterworths page 7.

<sup>101</sup> Swartz Journal of Moral Education, 2006 pages 560-561.

It has been suggested that conventional legal litigation appears to be grounded in the ethic of consequence, whereas alternative dispute resolution and particularly mediation and conciliation finds itself focusing on the ethics of responsibility, moral ambiguity and consequence.<sup>102</sup> The focus of traditional litigation is often viewed as an attempt to seek a perfect right, with a clear distinction being made between the winner and the loser. In sharp contrast to the philosophy behind traditional legal litigation, the ethical considerations motivating decisions in alternative dispute resolution, is that of causing the least amount of harm to all those involved.<sup>103</sup> It is for this reason that the CCMA was created as the centrepiece of the of the statutory dispute resolution system in South Africa.<sup>104</sup>

## **5. The process of conciliation in labour disputes at the CCMA**

The CCMA is a self-governing statutory agency which operates independently from the state, even though it is state funded.<sup>105</sup> Its four main compulsory functions are:<sup>106</sup>

- To conciliate disputes referred to the CCMA in terms of the LRA;
- To arbitrate disputes which could not be settled on conciliation;
- To assist with the creation of workplace forums;
- To keep records and make available statistics about its activities.

The process of conciliation in labour disputes by the CCMA is a form of statutory or compulsory conciliation. The LRA in its Section 135 provides:

### 135. Resolution of disputes through conciliation

“(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

---

<sup>102</sup> Trollip page 7.

<sup>103</sup> Trollip page 3.

<sup>104</sup> Van Niekerk, *et al.* page 449.

<sup>105</sup> Section 114 of the Labour Relations Act 66 of 1995.

<sup>106</sup> Section 115 of the Labour Relations Act 66 of 1995.

- (2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral:  
However, the parties may agree to extend the 30-day period.
- (3) The commissioner must determine a process to attempt to resolve the dispute, which may include
  - (a) mediating the dispute;
  - (b) conducting a fact-finding exercise; and
  - (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.
- (3A) If a single commissioner has been appointed in terms of subsection (1), in respect or more than one dispute involving the same parties, that commissioner may consolidate the conciliation proceeding so that all the disputes concerned may be dealt with in the same proceedings.
- (5) When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-
  - (a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;
  - (b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and
  - (c) the commissioner must file the original of that certificate with the Commission.
- (6)(a) If a dispute about a matter of mutual interest has been referred to the Commission and the parties to the dispute are engaged in an essential service then, despite subsection (1), the parties may consent within seven days of the date the Commission received the referral-
  - (i) to the appointment of a specific commissioner by the Commission to attempt to resolve the dispute through conciliation; and
  - (ii) to that commissioner's terms of reference.

- (b) If the parties do not consent to either of those matters within the seven-day period, the Commission must as soon as possible-
- (i) appoint a commissioner to attempt to resolve the dispute; and
  - (ii) determine the commissioner's terms of reference. “

The 1995 LRA distinguishes between three types of disputes based on the dispute resolution mechanisms that should be used to resolve them.<sup>107</sup> These subcategories are:

- Disputes that are arbitrable by the CCMA of relevant bargaining counsel;<sup>108</sup> and
- Disputes that are justiciable by the labour court;<sup>109</sup> and
- Disputes that must be resolved by the exercise of economic power through strikes and lock-out in support of their particular demands.<sup>110</sup>

The classification of disputes in such a manner goes beyond only being of academic importance. The classification of a dispute determines whether a specific type of dispute may be referred to the statutory dispute resolution process and if so, what are the options available to the referring party.<sup>111</sup>

It is a vital part of the statutory labour dispute resolution process that disputes first be referred to the CCMA of relevant bargaining council for conciliation. Should the conciliation process fail, then only may the parties refer the dispute to the next level of dispute resolution be it industrial action, arbitration or adjudication.<sup>112</sup> Accordingly, in terms of the LRA the CCMA, bargaining or statutory council or accredited agency must

---

<sup>107</sup> Van Niekerk, *et al.* page 445.

<sup>108</sup> Section 115 of the Labour Relations Act 66 of 1995.

<sup>109</sup> Section 157 of the Labour Relations Act 66 of 1995.

<sup>110</sup> Section 67 of the Labour Relations Act 66 of 1995.

<sup>111</sup> Van Niekerk, *et al.* page 446.

<sup>112</sup> Van Niekerk, *et al.* page 447.

attempt to resolve the matter through conciliation.<sup>113</sup> As a rule, any party to a dispute may refer the dispute to the CCMA for conciliation.<sup>114</sup>

However, the right to refer is limited in terms Section 191 of the LRA, which provides that, should the dispute be based on either unfair dismissal disputes or unfair labour practices, such a referral may only be made by the employee.<sup>115</sup> This was confirmed in the matter of *Maseko v Entitlement Experts*<sup>116</sup> by the arbiter rejecting the employers claims that he was entitled to refer the dispute to the CCMA for conciliation, based on the employees absconding from his employment and subsequently led to the employer suffering losses due to the actions of the employee.<sup>117</sup>

In the later matter of *NEWU v CCMA*,<sup>118</sup> Judge Landman confirmed the position held in the Maseko matter, however he further provided that the conduct of the employee which has led to the dispute being referred to the CCMA may amount to a breach of the employers' constitutional right to fair labour practices in terms of Section 23 of the Constitution. Judge Landman cautioned the CCMA by stating the it is inconceivable that the legislature intended to limit the constitutional right to fair labour practices through its definition of unfair labour practices in the LRA.

The CCMA is required to arrange for conciliation within 30 days<sup>119</sup> from the date of referral, which is in keeping with the objective of the LRA for disputes to be resolved without delay, due to the dire consequences that labour disputes and specifically dismissal may have on the parties.<sup>120</sup> The parties to the dispute must receive at least 14 days' notice of the time date and location at which the conciliation is to take place.<sup>121</sup> On the day the dispute is scheduled to take place the parties must attend the conciliation meeting.<sup>122</sup>

---

<sup>113</sup> Bosch, *et al.* page 12.

<sup>114</sup> Section 134 of the Labour Relations Act 66 of 1995.

<sup>115</sup> Bosch, *et al.* page 71.

<sup>116</sup> [1997] 2 BLLR 317.

<sup>117</sup> Bosch, *et al.* page 71.

<sup>118</sup> [2004] 2 BLLR 165 (LC)

<sup>119</sup> In terms of CCMA rule 3(1) 'day means a calendar day or working day. Saturdays, Sundays and Public holidays are excluded, as well as the period from 15 December to 7 January yearly.

<sup>120</sup> Bosch, *et al.* page 76.

<sup>121</sup> Rules of Conduct of Proceedings before the CCMA, Rule 11.

<sup>122</sup> Rules of Conduct of Proceedings before the CCMA, Rule 13.

Even though the act provides that both parties must be present the consequences of not attending the conciliation meeting has become a contentious issue in the Labour Court. In terms of CCMA rule 13(4) should a party to the dispute fail to attend the proceedings the commissioner may deal with the matter as provided for in CCMA Rule 30:

- “What happens if a party fails to attend proceedings before the Commission
- (1) If a party to the dispute fails to attend or be represented at any proceedings before the Commission, and that party-
- (a) had referred the dispute to the Commission, a commissioner may dismiss the matter by issuing a written ruling; or
  - (b) had not referred the matter to the Commission, the commissioner may-
    - (i) continue with the proceedings in the absence of that party; or
    - (ii) adjourn the proceedings to a later date.
- (2) A commissioner must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of sub rule (1).
- (3) If a matter is dismissed, the Commission must send a copy of the ruling to the parties.”

When considering the objectives of conciliation and the function of the conciliator at conciliation, the application of CCMA Rule 30 in cases of nonappearance by either party is nonsensical.

The legality of CCMA Rule 13(4) was challenged in the matter of *Premier, Gauteng & another v Ramabulana NO & others*.<sup>123</sup> Judge President Zondo provided that CCMA Rule 13(4), read together with CCMA Rule 30, does not and could never empower conciliators to dismiss disputes between parties should either or neither party be absent from scheduled conciliation meetings. Should the parties be absent during the conciliation process, the conciliating Commissioners are obliged to issue a certificate

---

<sup>123</sup> [2008] 4 BLLR 299 (LAC).

in terms of Section 135(5) of the LRA within 30 days after the referral, and the employee acquires a right to refer the matter for arbitration or adjudication.

Accordingly, the employees' failure to attend a conciliation meeting cannot deprive them of the right to have their disputes arbitrated or adjudicated.<sup>124</sup> The CCMA rules which provide that parties must attend conciliation hearings, and which give Commissioners the option of dismissing the matter if a party fails to attend in person are therefore in conflict with the LRA. Where employees or the employers for that matter, fail to appear at a conciliation meeting, the commissioner may only postpone the matter or issue a certificate confirming that the dispute has not been resolved.

The rules empowering commissioners to 'dismiss' matters if parties fail to attend conciliation meetings, must accordingly be interpreted as conferring on commissioners the limited power to direct that no further conciliation meeting may be held. The court accordingly found that the respondent commissioner had acted outside his powers, and that the employee did not need to apply for condonation before referring the matter for arbitration.<sup>125</sup>

## **6. The function of the conciliator during the process of conciliation**

Conciliation is a fundamentally essential part of the labour dispute resolution process in terms of the LRA, however the term conciliation has remained undefined in the LRA.<sup>126</sup> Section 135 of the LRA requires a commissioner at the CCMA to attempt to resolve the matter through conciliation prior to arbitration. The conciliation process is without prejudice and all disclosures made during this process are confidential.<sup>127</sup>

The LRA does not prescribe specific conciliation procedures and relies heavily on the discretion on the individual commissioners to facilitate the conciliation in a manner that

---

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Kasipersad v CCMA* [2003] 2 BLLR 187 (LC).

<sup>127</sup> *Van Niekerk, et al.* 449.

which is in line with objectives of the LRA.<sup>128</sup> Section 135(3) of the LRA provides specifically that the commissioner must determine the process to be used to resolve a dispute that has been referred to the CCMA. These processes may include mediation, recommendations to the parties as well as embarking on a fact-finding mission and individually discussing the possibility of success with each party, who are only limited by the imagination of the commissioner.<sup>129</sup>

The role of the conciliator much the same as the conciliation process is not being defined in the LRA. This has necessitated judicial intervention in assisting with the development of the roles and responsibilities of the conciliators. This is may become a lengthy and expensive process characterised by 'what not to do' as conciliators during conciliation, rather than provide actual guidelines. The court did exactly that, when tasked with deciding whether the conciliator had over stepped these boundaries in advising parties during conciliation. In the matter of *Kasipersad v CCMA*<sup>130</sup> Pillay J, provided conciliators should be very careful in providing parties with advice, as giving advice is counterproductive to the objectives of conciliation and could unduly influence the parties and create an impression with the parties' that the conciliator is not impartial.

The conciliator is required to remain impartial during dispute resolution, which requires the ability of the conciliator to distance him or herself from their personal opinions and to direct the parties to find a solution for their conflict themselves.<sup>131</sup> The advisory function of the CCMA is limited to, if asked, advise a party to a dispute about the procedure to follow in terms of the LRA.<sup>132</sup> Should the commissioner make any other recommendations to the parties during conciliation, such recommendations should take the form of an advisory award.<sup>133</sup> The motivation for requiring a written advisory award being required should the conciliator wish to provide advice is due to the fact that, unlike an arbitration where a Commissioner is obliged to keep a record of the

---

<sup>128</sup> *Ibid.*

<sup>129</sup> Brand, Lotter, Steadman & Ngcukaitobo page 18.

<sup>130</sup> [2003] 2 BLLR 187 (LC).

<sup>131</sup> Anstey "Managing Change Negotiating Conflict" Third Edition 2006 Juta Academic Ebooks page 251.

<sup>132</sup> Section 115(2)(a) of the Labour Relations Act 66 of 1995.

<sup>133</sup> Section 135(3)(c) of the Labour Relations Act 66 of 1995.

proceedings, a similar obligation is not prescribed for conciliation. By its nature, conciliation is confidential.<sup>134</sup>

The commissioners should remember that despite the immense pressure of achieving numerical goals for settlement, for him or her to be successful during conciliation their actions must remain acceptable to all the parties involved in the dispute. With employers and trade union officials agreeing that conciliators should have enduring qualities such as honesty, integrity, trust, fairness, impartiality, reliability, patience and persistence, be physically fit, have the ability to grasp ideas and be good listeners, be tactful, persuasive, self-controlled, dignified, respectful, intelligent, have a sense of humour, sensitivity and approachable.<sup>135</sup>

## **7. Confidentiality at conciliation proceedings**

In order for conciliation to be effective in its objective of resolving disputes through mutual agreement, it requires the parties to the dispute to be comfortable and free from fear that that disclosures made during these proceedings will form part of the evidence presented at arbitration or adjudication, should the conciliation process fail.<sup>136</sup> It is for this reason that any submissions made during the conciliation proceedings should be regarded as private and confidential and may not be testified or referred to in testimony, during any subsequent legal proceedings resulting from unsuccessful conciliation.<sup>137</sup>

The LRA provides that the CCMA may not disclose to any person or court any information in the form of knowledge or documentation, that it acquired on a

---

<sup>134</sup> This approach to conciliation is underpinned by rules 7(3) and 7(4) of the rules of the CCMA, which provide:

Rule 7(3) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis so that no party may refer to statements made at conciliation proceedings during any subsequent proceedings unless the parties have so agreed in writing.

Rule 7(4) Neither the Commissioner dealing with the conciliation nor anybody else attending the conciliation hearing may be called as a witness during any subsequent proceedings to give evidence about what transpired during the conciliation process.

<sup>135</sup> Anstey pages 257-258.

<sup>136</sup> Bosch, *et al.* page 79.

<sup>137</sup> Bosch, *et al.* page 71.

confidential basis or without prejudice in the performing of its functions.<sup>138</sup> This is given practical effect in CCMA Rule 16, which reads as follows:

“(1) Conciliation proceedings are private and confidential and are conducted on without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

(2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation.”

In the matter of *Hofmeyer v Network Healthcare Holdings (Pty) Ltd*,<sup>139</sup> Acting Judge van Niekerk held that no party to the to the conciliation process may lead evidence by affidavit or viva voce concerning what transpired during the conciliation process, this includes evidence on what was said as well as what was not said. Accordingly, a party cannot base an argument on the fact that specific points were not placed in dispute during conciliation.

## **8. Conclusion**

The process of conciliation in South African labour law is not a new one, however the process of conciliation as part of alternative dispute resolution has under gone major changes for this process to be less formalistic in nature and more user friendly for the parties involved in a labour dispute.

In order to give effect to the constitutional ideologies through the concialtion and making the referral process of dismissal law available to dismissed employees free of charge, the CCMA has provided a forum for employees to ventilate disputes with their employers on an equal footing. In an attempt to reach a mutually acceptable agreement between the parties.

---

<sup>138</sup> Section 126(3) of the Labour Relations Act 66 of 1995.

<sup>139</sup> [2004] 3 BLLR 232 (LC).

However noble the intentions of the CCMA may be in providing and facilitating the process of conciliation in disputes of alleged unfair dismissal, it is not immune to being abused by parties who may not have the best of intentions when referring a dispute to the CCMA in the first place.

# **Chapter 3 - Problems related to conciliation as an alternative dispute resolution process in dismissal cases**

## **1. Introduction**

Conciliation has long been part of the South African system of employment relations and alternative dispute resolution. In this chapter some of the problems associated with the process of conciliation will be identified in order to provide recommendations which may be helpful in addressing some of these shortcomings in the process.

## **2. The following problems have been identified in the conciliation process at the CCMA:**

- a) Lack of legal knowledge.

At its core the relationship between an employer and employee is governed by an agreement between the employer and the employee, which provides the duty of the employee to make him or herself available to the employer to perform a specific function in good faith and for the employer to remunerate the employee for such service.<sup>140</sup>

Traditionally, in terms of common law, more emphasis was placed on the principle freedom of contract which relied on the ability of the individual parties to regulate their own employment relationship. The contract of employment was individual in nature and the regulation of the terms thereof remained the prerogative of the individuals involved.<sup>141</sup> The common law did not provide for the inequality in bargaining power and prevention of the exploitation of employees.<sup>142</sup> Resulting in the legislative intervention by the legislature. It remains the prerogative of the employer to discipline

---

<sup>140</sup> Van Niekerk, *et al.* page 89.

<sup>141</sup> Mischle *Contractually Bound: Fairness, Dismissal and Contractual Terms* (2004) CLL 13(9) 82.

<sup>142</sup> Smit "Disciplinary enquiries in terms of schedule 8 of the labour relations act 66 of 1995", PhD thesis, University of Pretoria, 2010 page 79.

the employee who has made him or herself guilty of work place transgressions.<sup>143</sup> The form of discipline executed by the employer may take various forms, the most serious of which is that of dismissal.

The employer may exercise his or her own discretion when disciplinary action should be taken against the employee, and is tasked with one of the most complex issues in labour law, being that of determining whether such disciplinary action will be regarded as substantively fair.<sup>144</sup> The issue of complexity stems from the notion that the concept of fairness vastly differs, not only between the employer and employee, but also between the labour courts, civil courts and eventually the Constitutional Court.<sup>145</sup>

The LRA prohibits representation during conciliation,<sup>146</sup> as legal representatives are perceived to have the effect of making the process legally complex and unnecessarily expensive.<sup>147</sup> This position was confirmed by the Supreme Court of Appeal in the matter of *Commission for Conciliation, Mediation and Arbitration & Others v Law Society of the Northern Provinces (incorporated as the Law Society of the Transvaal)*.<sup>148</sup> Accordingly, both the employer and employees who have chosen not to exercise their right to freedom of association,<sup>149</sup> and associate with either a trade union or employers' organisation respectively are penalised for doing so.

In the author's practical experience, the employers must weigh up the perceived unproductive time spent away from their place of business against the costs of settling the matter at conciliation irrespective of the employee's validity of the referral, due to the financial pressure associated with unproductive hours away from running the business.

---

<sup>143</sup> Smit page 3.

<sup>144</sup> Smit page 6.

<sup>145</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC)

<sup>146</sup> CCMA Rule 25(1)(a) provides that a director, employee or member of the employers' organisation may also represent an employer.

<sup>147</sup> *Norman Tsie Taxies v Pooe NO & Others* (2005) 26 ILJ 109 (LC).

<sup>148</sup> (2013) 34 ILJ 2779 (SCA).

<sup>149</sup> Section 18 Constitution of the Republic of South Africa, 108 of 1996.

b) Legal uncertainty as to concepts of fairness in dismissal law.

During 2009 an estimated 80% of referrals to the CCMA were based on allegations of unfair dismissals.<sup>150</sup> Considering the current economic environment this percentage has certainly not decreased in recent years. The actions of the employer are placed under the microscope when determining whether its actions in dismissing an employee may be considered fair. However, the Labour Relations Act<sup>151</sup> in its Schedule 8 provides little guidance as to the concept of substantive fairness other than providing that dismissal must be for fair reason.<sup>152</sup>

The burden of proof rests solely on the employer to prove that the reason for dismissal was indeed a fair reason.<sup>153</sup> However the line between misconduct that warrants dismissal and that which does not is often very difficult to draw in practice, especially when reminded that the employer usually has little or no legal training.<sup>154</sup> Resulting in timeous and expensive litigation in order to establish what should be considered a fair reason for dismissal due to misconduct of an employee. After having done everything right, the employer especially in referrals as expected to take part in the conciliation process, which not only is perceived as an inconvenience but also time consuming and often frustrating to the employer who must make time and resources available to attend such proceedings.

c) Lack of consequences for unwillingness to participate in conciliation.

The importance of conciliation as a form of alternative dispute resolution has been stressed in chapters 2 and 3 of this study. Ideally parties should be willing to resolve disputes themselves with minimal intervention by third parties. However, when it

---

<sup>150</sup> Benjamin "Conciliation, Arbitration and Enforcement: The CCMA's achievements and challenges" 2009 ILJ page 26.

<sup>151</sup> Act 66 of 1995.

<sup>152</sup> The classification provided in section 188 of the labour relations act reflect the classification introduced by the International labour organisation convention on the termination of employment at the initiative of the employer, 1982 No. 158 of 1982. Convention is unratified by the Republic of South Africa.

<sup>153</sup> Schedule 8 item 2 of Labour Relations Act 66 of 1995.

<sup>154</sup> Van Niekerk, *et al.* page 273.

comes to employment relationships, it is often easier said than done, with the irreparable breakdown of the trust relationship between the employer and the employee forming the basis of the majority of dispute. Nevertheless, the saying “you can lead a horse to the water, but one cannot make it drink” rains ever true in conciliation proceedings.

There is however genuine concern about the impact that forced conciliation or mediation may have on the philosophy that underpins conciliation which at its core is based on principles of voluntarism. Even though the LRA requires a party to attempt conciliation, it cannot force the parties to attend the proceedings.<sup>155</sup> The CCMA’s inability to dismiss disputes due to the absence of the referring party or proceeding without the responding party due to nonappearance at conciliation was confirmed in the matter of *Premier Gauteng & another v Ramabulana NO & others*.<sup>156</sup> The CCMA may refuse to refer the matter for conciliation at a later stage, but does not affect either party to refer the matter for arbitration or adjudication.

The Labour court may refuse to adjudicate a matter, should it believe the parties did not attempt to resolve the matter through conciliation and accordingly refer the matter back to the CCMA to attempt conciliation before proceeding with adjudication.<sup>157</sup> The constitutionality of this limitation of Section 34 of the Constitution, the right to access to the courts, by placing a requirement to attempt conciliation prior to the labour court being willing to hear the matter, has to date not been tested by the constitutional court, nor has it been confirmed by any other court even though the application thereof may be an infringement on the access to a free public hearing.<sup>158</sup>

d) Abuse of the alternative dispute resolutions procedures at the CCMA.

---

<sup>155</sup> Tokiso The Dispute Resolution Digest 2015, Mandatory mediation in South Africa: are there constitutional implications? John Brand and Chris Todd pages 47 to 64.

<sup>156</sup> [2008] 4 BLLR 299 (LAC).

<sup>157</sup> *NUMSA v Driveline Technologies* [2000] BLLR 20 (LAC).

<sup>158</sup> Tokiso pages 47- 64.

Recent years have seen a significant increase in disputes being referred to the CCMA for dispute resolution, even though an estimated 40% of disputes referred to the CCMA by employees are not decided in their favour, the number of disputes dealt with by the CCMA year on year keeps increasing. Which is indicative of the current state of our labour market and sluggish economic growth.<sup>159</sup> There has also been a significant rise in disputes being referred to the CCMA based on fabricated facts, deliberate misrepresentations of facts which amounts to frivolous and vexatious claims. In some instances, disputes are referred to vindictively extort money from the employer or simply to avoid discipline.<sup>160</sup>

Such practices are not only dishonest but is a drain of the CCMA's time and resources, which receives its entire funding from the fiscus through grant transfers from the Department of Labour.<sup>161</sup> Placing an unnecessary burden on the state's tax payers who have in the last year have been plagued by income tax increases in the first week of April, was downgraded to a sub-investment grade by the international ratings agencies Standard & Poor (S&P) Global Ratings and Fitch Ratings.

There has been much debate on the reasons for the increase in referrals, some of them being the fact that it is easy for employees to refer disputes to the CCMA from a procedural perspective and there are no costs associated with referring the matter for dispute resolution.<sup>162</sup> The CCMA and Labour Court has resorted to awarding cost orders against employees found to be guilty of such practices, however these cost orders in terms of Section 27(b) LRAA<sup>163</sup> are more often than not unenforceable, due to the derelict financial state of the employee's affairs.<sup>164</sup> More over the LRA does not make provision for awarding costs against an employee who referred a dispute to the CCMA with ill intent and subsequently withdraws the dispute prior to finalisation as there is no requirement of tendering costs when withdrawing a dispute. It is clear that

---

<sup>159</sup> The CCMA Annual Report 2015/2016 (available at <http://www.ccma.org.za>) page 19.

<sup>160</sup> Israelstam "There is a significant number of referrals based on facts that are mis-represented" in The South African labour guide available at <http://bit.ly/1MdTmQa> (accessed on 8 September 2017).

<sup>161</sup> The CCMA Annual Report 2015/2016 (available at <http://www.ccma.org.za>) page 19.

<sup>162</sup> Smit A critical analysis of "absolution from the instance" in South African labour law with specific reference to the CCMA 2016 (79) THRHR page 95.

<sup>163</sup> Labour Relations Amendment Act 12 of 2002.

<sup>164</sup> Smit A critical analysis of "absolution from the instance" in South African labour law with specific reference to the CCMA 2016 (79) THRHR page 95.

the dispute referral procedure is in dire need of re-evaluation for continued effective alternative dispute resolution in the CCMA.

e) Negative effect on legal development.

Prior to the labour law revolution in the early 1980's the foundation of South African labour law was found in the 1950 words of Otto Kahn-Freud:<sup>165</sup>

*“The main object of labour law has always been, and always must venture to say always will be, to be a countervailing force to counter act the inequality of bargaining power which is inherent and must be inherent in the employment relationship.”*

At the heart of the any dispute lies conflict, which is something that should not be shied away from, as the benefits of conflict are much greater than the small victories for the parties directly involved in the specific conflict. Conflict offers opportunity and as such contains seeds of opportunity.<sup>166</sup> Social conflict leads to the formulation of norms and new rules of conduct, making it possible for the readjustment of the relationship between parties, should the interactions between the aggrieved parties be blocked and left unable to mature social conflict may lead to hostility and violence.<sup>167</sup>

In much the same way labour law evolves and develops to remain effective in the current labour environment. Should disputes not be properly ventilated in the Courts but merely settled for fear of reprisal or through convenience of paying a nominal amount as settlement 'for the dispute to go away'. Negatively impacts the development of the labour law by the Labour Courts and the legislature alike.

### **3. Conclusion**

---

<sup>165</sup> Davie and Freedland, "Kahn-Freund's Labour and the Law", Third Edition, Stevens, 1983 page 18.

<sup>166</sup> Trollip page 7.

<sup>167</sup> Trollip page 8.

As conflict will forever be experienced by the parties involved in any employment relationship the manner in which such conflicts are dealt with efficiently is key to the continued attempt to achieve harmony in the work place.

Despite the problems faced by the CCMA as identified *supra*, the role of conciliation as part of alternative dispute resolution when there are unfair dismissal allegations remains of utmost importance. As it enables the parties to ventilate the issues in a quick, more cost-effective manner.

However, in its current form and without evolving with the dynamics of the current labour market or having been adapted to address these challenges mentioned above the process of conciliation may lose the public's confidence in its effectiveness as a form of alternative dispute resolution.

# Chapter 4 - Conciliation in the United Kingdom

## 1. Introduction

The development of South African labour law has been highlighted in Chapter 1, considering the preverbal procedural law umbilical cord between South Africa and the United Kingdom, the choice of this comparative study was rather logical. Labour law, as a discipline of law, in the United Kingdom, much the same as in South Africa, has been characterised by sporadic reactive development in reaction to social and political changes in the respective countries.

## 2. Background to UK labour development

In the years leading up to the 1979, which saw the election of Margaret Thatcher as the Prime minister of the United Kingdom, the pendulum of bargaining power swung heavily in favour of the labourers and trade unions.<sup>168</sup> This was evident in the in the coal miner strike of 1974, through which the public-sector unions managed to disrupt essential services.<sup>169</sup> With the election of the conservative government of Prime Minister Thatcher, a process of labour reform in the United Kingdom. Between 1980 and 1993 no less than six pieces of legislation were enacted by the Thatcher Government as corrective measures among others, to limit the excessive power held by the trade unions of old and the 'collective laissez-fair' developed by Sir Otto Kahn-Freund.<sup>170</sup>

During 1982 the Termination of Employment convention – C158 was put into force by the International Labour Organisation.<sup>171</sup> Even though neither the United Kingdom nor

---

<sup>168</sup>Labour Market Reform in the United Kingdom: From Thatcher to Blair John T. Addison University of South Carolina and University Birmingham (U.K.) W. Stanley Siebert University of Birmingham (U.K.) page 2.

<sup>169</sup> Labour Market Reform in the United Kingdom: From Thatcher to Blair John T. Addison University of South Carolina and University Birmingham (U.K.) W. Stanley Siebert University of Birmingham (U.K.) page 3.

<sup>170</sup> Van Niekerk, *et al.* page 9.

<sup>171</sup>[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:312303:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312303:NO) (accessed on 16 November 2017)

South Africa have ratified the convention, their legislative development reflects their willingness to conform to the international standards set by the International Labour Organisation.<sup>172</sup>

Article 8 of the ILO convention C158 is of some significance for the purposes of this study and provides as follows:

#### Procedure of appeal against termination

##### Article 8

- “ 1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.
2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.
3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.”

During 1999 the United Kingdom enacted the Employment Rights Act of 1999, which aims at the regulation of disciplinary enquiries at the work place and dispute settlement procedures and during 2008, the Employment Act of 2008 was enacted which expands on the dispute resolution and disciplinary procedures.<sup>173</sup> In terms of the Employment rights Act of 1998, the employee has the right not to be unfairly dismissed.<sup>174</sup> The legislation carries on to state that there must be fair reason for the dismissal of an employee, based on capabilities, conduct, redundancy or any other substantively fair reason.<sup>175</sup>

---

<sup>172</sup> Here after referred to as the 'ILO'.

<sup>173</sup> International Labour Organisation - The Termination of Employment convention – C158.

<sup>174</sup> Section 94(1) of the Employment rights act

<sup>175</sup> Section 98 of the Employment rights act

The Employment Act of 2008 creates a framework for disciplinary procedures, both pre-and post-dismissal.<sup>176</sup> The statutorily prescribed procedure in disputes arising in matter where unfair dismissal is alleged by the employee is remarkably similar to the procedure in South Africa.

### **3. The role of ACAS in dispute resolution**

Disputes of Right in the United Kingdom, specifically disputes based on allegations of unfair dismissal are referred to the Advisory, Conciliation and Arbitration Service<sup>177</sup> by the Employment Tribunal upon receiving the ET1 from the employee alleging unfair dismissal.<sup>178</sup>

It is at this point that a conciliator will attempt to resolve the dispute and facilitate settlement between the disputing parties. However, the parties are under no statutory obligation to participate in the conciliation process.<sup>179</sup> Should conciliation fail at ACAS the dispute is referred back to the Employment Tribunal for hearing. The role of ACAS as part of the Alternative Dispute resolution process is essential. During 2014 the statutory early conciliation was introduced by ACAS, resulting in an estimated 20 % to 25 % being settled in terms of a “COT3 Settlement agreement”. While post-claim conciliation will continue to play an important part in Employment Tribunal litigation, pre-claim conciliation has now been replaced by a statutory early conciliation scheme.<sup>180</sup> Should the conciliation officer at ACAS at any time during the conciliation process conclude that settlement is not possible or if settlement cannot be reached during the prescribed period an early conciliation certificate will be issued by ACAS.<sup>181</sup>

### **4. The role of the Employment Tribunal in alternative dispute resolution**

---

<sup>176</sup> Employment Act of 2008 Schedule 2.

<sup>177</sup> Hereafter referred to as ‘ACAS’

<sup>178</sup> Employment Act of 2008 Schedule 2.

<sup>179</sup> Section 18(2) of the Employment Act of 2008.

<sup>180</sup> Brian Doyle, *Arbitration* 2015, 81(1), pages 20-24 Westlaw.

<sup>181</sup> *Ibid.*

Upon receipt of the acceptance of a claim, an employment judge shall review and consider all the documentation relating to the claim and if necessary request that further information be submitted by the parties. Based on the assessment of the provided documentation the Employment Tribunal shall confirm whether there is an arguable claim established by the claimant.<sup>182</sup>

The employment judge conducting the consideration may make an order regarding the case management of the matter. Such an order may deal with the listing of a preliminary or final hearing, and may propose judicial mediation or other forms of dispute resolution.<sup>183</sup> Alternatively the employment judge may order a preliminary hearing during which the following may be ordered:

- (a) That a preliminary consideration of the claim with the parties be conducted in order for a case management order to be made;<sup>184</sup>
- (b) determine any preliminary issue;<sup>185</sup>
- (c) consider whether a claim or response, or any part, should be struck out;<sup>186</sup>
- (d) make a deposit order;<sup>187</sup> and
- (e) explore the possibility of settlement or ADR (including judicial mediation).<sup>188</sup>

The Employment Tribunal was originally designed as a 'people's court' where legal representation was not required. The Tribunal's decision maker, having a legal background is assisted by two advisory members, one with experience as an employer and the other having experience in representing employees such as trade unionists.<sup>189</sup>

---

<sup>182</sup> *Ibid.*

<sup>183</sup> Employment Tribunals Rules of Procedure 2013 r.26.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

<sup>186</sup> Employment Tribunals Rules of Procedure 2013 r.37.

<sup>187</sup> Employment Tribunals Rules of Procedure 2013 r.39

<sup>188</sup> Employment Tribunals Rules of Procedure 2013 r.53.

<sup>189</sup> Purcell, UK "Individual disputes at the workplace – alternative dispute resolution"

<http://www.eurofound.eu/observatories/eurwork/comparative-informatin/national-contributions/united-kingdom/uk-individual-disputes-at-the-workplace-alternative-dispute-resolution> -2010-02-09 (accessed on 2017-11-16)

## 5. Alternative dispute resolution in South Africa as compared to that of the United Kingdom

South Africa has an undeniably similar labour dispute resolution system when compared to that of the United Kingdom. With both countries continuously striving to conform to international labour standards such as the Convention C158.<sup>190</sup> However, there are some significant differences which may be considered to effectively keep developing the role of conciliation in South African labour law.

Firstly, the dispute referral form, the ET1 form being an extensive 15-page questionnaire, requires the referring party to provide sufficient detail and any relevant documentation to substantiate the allegations be provided from the get go.<sup>191</sup> The ET1's, South African version however requires very little information be provided by the referring party as to the circumstances that gave rise to the dispute in the first place.<sup>192</sup>

Secondly, the referral process of disputes, are traditionally referred to the Employment Tribunal in terms of an ET1 form. Such referrals are assessed in terms of their validity in light of the tribunals jurisdiction. The Employment Tribunal will then decide what the appropriate procedure is to be followed. This is important not only for the effective dispute resolution in that particular referral, but may affect the course of legal development through not dictating mandatory case management structures but rather assessing each matter based on its own merit. Should the parties to the dispute wish to make use of early cancellation, the dispute may be referred to the ACAS, however this process entirely voluntary and does not affect either of the parties to the dispute's right to refer the matter to the relevant employment tribunal should early conciliation be unsuccessful.<sup>193</sup> The position in South Africa is rather different, in that a matter referred to the CCMA must be referred to conciliation and settlement must be attempted by the conciliator, irrespective of the merit or validity of the allegations

---

<sup>190</sup> International Labour Organisation - The Termination of Employment convention – C158.

<sup>191</sup> <https://www.cilex.org.uk/pdf/pdf%20ET1%20Form%20for%20SA%20ONLY.u19%20June%202011.pdf> (accessed on 16 November 2017).

<sup>192</sup> <http://www.ccma.org.za/Advice/CCMA-Referral-Forms> (accessed 16 November 2017).

<sup>193</sup> <http://www.acas.org.uk/index.aspx?articleid=4028> (accessed on 16 November 2017).

made.<sup>194</sup> By providing a mandatory case management structure matters are not assessed by the CCMA prior to conciliation is attempted irrespective of whether conciliation will be the appropriate alternative dispute resolute process.

Thirdly, the employment tribunal judge is required to have a legal background, however he or she is assisted by an advisory repetitive with experience as employer and an employee repetitive respectively. This being the format of the tribunal it is not dependant on prior affiliation with specific employers' organisations or trade unions. In terms of Rules for the conduct of Proceedings before the CCMA,<sup>195</sup> the parties to a dispute based allegations of unfair dismissal, must be present in person during conciliation and arbitration must and may only be represented by an office bearer or representative of that parties' trade union or employers' organisation.<sup>196</sup> Despite the general right to legal representation this right is limited in arbitration proceedings that resulting from allegations of unfair dismissal.<sup>197</sup> Accordingly, as a general rule the parties will not be allowed representation should they not be affiliated with a representative trade union or employers' organisation.

Finally, in what started out to be a comparative difference, through the course of this paper became a similarity. The costs associated with referring disputes to the employment tribunal. On 25 April 2013 a draft of the Fees Order was laid before Parliament in the United Kingdom. The reasoning for enacting legislation which required that a fee be paid when refereeing a dispute to the Employment Tribunals was based. Firstly, and most importantly, fees would help to transfer some of the cost burden from general taxpayers to those that used the system, or caused the system to be used. Secondly, a price mechanism could incentivise earlier settlements. Thirdly, it could dis-incentivise unreasonable behaviour, such as pursuing weak or vexatious claims.<sup>198</sup>

---

<sup>194</sup> Section 135(1) of the Labour Relations Act 66 of 1995.

<sup>195</sup> CCMA Rule 25.

<sup>196</sup> Subject to the exceptions provided for in terms of Rule 25(1)(c).

<sup>197</sup> CCMA Rule 25(1)(c).

<sup>198</sup> Brian Doyle, Arbitration 2015, 81(1), pages 20-24 Westlaw.

It was debated and approved by both Houses under the affirmative resolution procedure. It was made on 28 July 2013 and came into force on the following day. The position dramatically changed on the 26<sup>th</sup> of June 2017 when the Supreme Court in the matter of *R (on the application of UNISON) v Lord Chancellor*<sup>199</sup> held that unusually high fees associated with referring a matter to the Employment Tribunal was not sensible, providing that the perceived reasons for such high fees were indeed the deterrence of referrals, which in its application was not in line with constitution right to access to justice. It should however be noted that the court did not attack the validity of imposing fees for referrals but rather the exorbitant amounts associated with such referrals.

Similar to the current position the United Kingdom, the referral of disputes irrespective of its nature is free of charge. Even though the CCMA has jurisdiction to award legal costs under exceptional circumstances, such awards are few and very far between.

## **6. Conclusion**

Since being colonised by the United Kingdom, South African's legal development is greatly influenced by the practices followed in the United Kingdom. However, given the differences in socio economic landscape between South Africa and the United Kingdom our infrastructure and law, the processes and practices have been and will further need to be adapted to suit the African context.

In the current format South Africa has a great many strides it will still have to make in order to effectively replicate the processes applied in the United Kingdom.

---

<sup>199</sup> [2017] UKSC 51.

# Chapter 5 – Conclusion and Recommendations

## 1. Introduction

The rate of referrals of disputes to the CCMA continues to rise year on year, and is projected to continue to rise as economic growth decreases and unemployment rates increase.<sup>200</sup> The conciliation at the CCMA plays a vital role in the resolving of labour disputes. However, the CCMA remains state funded and limited by its own lack of resources.<sup>201</sup>

## 2. Recommendations

In order to protect the efficiency and accessibility of the CCMA the author would make the following recommendations based on the problem areas identified in Chapter 3 of this paper.

Both the employers and employees have little or no knowledge regarding the intricacies of dismissal law and processes associated with alternative dispute resolution. In the attempt to simplify the process of referring dismissal disputes to the CCMA it has created tremendous uncertainty with employers and employees alike.

It is suggested that the parties to the dispute be allowed representatives during the conciliation process in an advisory capacity. The courts have held that the right to legal representation does not extend to the conciliation and arbitration process in dismissal

---

<sup>200</sup> The CCMA Annual Report 2015/2016 (available at <http://www.ccma.org.za>) page 19.

<sup>201</sup> Brand, Lotter, Steadman & Ngcukaitobo "Labour Dispute Resolution" Second Edition 2008 Juta & Co page 24.

disputes at the CCMA<sup>202</sup>, however the onus rests with the employer to prove fairness on both its substantive reasoning and procedure followed when exercising their disciplinary actions against employees. Due to their lack of legal knowledge and not knowing what information is crucial to the considerations of the arbiter the arbitration process often becomes sluggish. With employers being caught between the interests of its business and the effect unproductive hours spent at the CCMA. By allowing legal practitioners to assist the parties in an advisory capacity it is believed that the process will be more effective.

Secondly the application of resources such as the specialised knowledge of the conciliators and decision makers be applied more effectively.<sup>203</sup> With the number of referrals received by the CCMA it is a growing concern that the system will not be able to keep up with the high demand for its services.<sup>204</sup>

That being said the author believes that there is much to learn from the referral system used in the United Kingdom.<sup>205</sup> By providing the claimant with a comprehensive referral form requiring that detail a documentary evidence be provided, in order for the CCMA to assess whether it will have jurisdiction to attend to the matter.<sup>206</sup> Should the CCMA, based on the referral forms find the referral to be baseless the CCMA should be provided with the jurisdiction to be able to dismiss these claims for those reasons. It is suggested that the employer be provided with the opportunity to answer to the allegations made, in writing, prior to the matter being heard. Placing both versions of the events before the conciliator enabling the CCMA to adequately assign its resources and time to effectively.

---

<sup>202</sup> CCMA v Law Society, Northern Provinces CCMA v Law Society, Northern Provinces (005/13) [2013] ZASCA 118 (20 September 2013).

<sup>203</sup> Brand, Lotter, Steadman & Ngcukaitobo Labour Dispute Resolution, Second Edition, Juta & Co, 2008 page 20.

<sup>204</sup> The CCMA Annual Report 2015/2016 (available at <http://www.ccma.org.za>) page 19.

<sup>205</sup> Employment Act of 2008 Schedule 2.

<sup>206</sup> Section 18(2) of the Employment Act of 2008.

Ideally the parties to a dispute should resolve their disputes by agreement, however due to the personal nature of the employment relationship and the far-reaching effects of termination of the employment relationship may have emotions more often than not play a major role in the willingness to participate in conciliation.<sup>207</sup> The parties to the dispute both feel wronged by the actions of the other and even though the conciliation process provides the opportunity for each party to state their version of events the perspectives of fair actions are usually very different. It is suggested that the through providing both parties with an opportunity to correspond with the conciliator as a process and not a once off event the parties may be more willing to compromise. Rather than have the confrontation associated with conciliation proceedings at the CCMA in its current format.

With reference to the fourth identified problem in chapter 3, the abuse of alternative dispute resolatory procedures at the CCMA. The current slow economic growth and increased unemployment in South Africa has many employers and employees fighting for economic survival. With the employment relationship being at the centre, employers are reliant on its employees and vice versa. Should the relationship between the employer and the employee terminate due to misconduct, incapacity or operational requirements the employee is often left unfavourable position, and it is for this reason that the CCMA endeavours to create means through which the fairness of the actions may be tested. However, the process is often abused by unwilling participants or vexatious referrals, clogging the system with matters that legally have no grounds. It is for this reason that the referral system in the United Kingdom may be more effective in dealing with these types of matters.

By having jurisdiction in determine which matters should be referred to the CCMA for conciliation and arbitration, these types of referrals will not have to be dealt with by conciliators at the CCMA and in, so the resources may be better applied elsewhere.

---

<sup>207</sup> Van Niekerk, et al. page 89.

Further the issue of consequences for vexatious referrals or unwillingness to participate in the process should formally be addressed. By creating consequences such as cost orders or fines the parties, it may curb the abuse of the system by employees who have been fairly dismissed and employers who view the CCMA as a waste of time.<sup>208</sup>

Last but not least is the issue of legal development. South African legal development as discussed in chapter 1, has been one of reactive change rather than proactive anticipation. That being said the nature of the employment relationship is ever changing with the legislation struggling to keep up with the needs of the people. It is for this reason that the participation of the judiciary in legal development is of great importance.

Even though the court and its judges provide adjudication at no cost to the parties, the litigation proceedings can often become very expensive and above the means of the average employee or employer. The CCMA attempts to fill this void. However, these proceedings at the CCMA are not under oath and are there no real consequences associated with misleading the commissioner as there would be in court of law. It is therefore proposed that the proceedings be conducted under oath and the commissioners be granted the power to refer matters of dishonesty to the court system.

### **3. Conclusion**

The process of conciliation in South African Labour law is not a new one, however the process of conciliation as part of alternative dispute resolution has under gone major

---

<sup>208</sup> Israelstam "There is a significant number of referrals based on facts that are miss-represented" in The South African labour guide available at <http://bit.ly/1MdTmQa> (accessed on 8 September 2017).

changes in order for this process to be less formalistic in nature and more user friendly for the parties involved in a labour dispute.

Very often at the core of any dispute is misunderstanding of each other's points of view, during the process of conciliation the conciliator aims to establish dialog between the parties and mutual awareness of the other's position, which may begin the process to settlement.

The development of alternative dispute resolution and more specifically the process of conciliation, which not only increases access to justice and relieve congestion in the courts, and proficiently gives effect to the constitutional ideologies of efficiency, informality and accessibility to parties who would under other circumstances not be able to have their disputes ventilated due to the high costs associated with litigation.

That being said, the question that needs to be asked, is whether in chasing these ideologies encapsulated in the Section 1 of the LRA, the process has become to informal and accessible. Which in doing so has now has the opposite practical effect, where parties to the conciliation process don't respect the ideals of conciliation process or in some cases abuse the process to extort a settlement based on convenience or an attempt to avoid legitimate consequences for transgressions. With no real consequences to either party should their intentions be questionable.

It is for this reason, that this paper has aimed at identifying possible short comings in the current process used for conciliation in disputes of dismissal law at the CCMA, for the objectives of effective dispute resolution to remain attainable in light of high unemployment rates in South Africa, and the continued increase of referrals to the CCMA year on year.

It is suggested that in order for concialtion to remain effective as part of alternative dispute resolution in the CCMA and not become a 'rubber stamp' exercise, which is neither effective for those involved nor respected by those involved, the process should be seen as being fluid and adaptable in order to deal with the labour disputes successfully.

# Bibliography

## Books

Van Niekerk, et al (2015) "Law@work" 2015 Third Edition, Lexis Nexis.

Basson, et al (2009) "Essential Labour Law, Fifth Edition, Labour Law Publications.

Le Roux and van Niekerk (1994) "The South African Law of Unfair Dismissal", Second edition, Juta & Co.

Finnemore (2006) "Introduction to Labour Relations in South Africa" Ninth Edition, LexisNexis.

Du Toit, et al (2015) "Labour Relations Law: A comprehensive guide" Sixth Edition LexisNexis.

Nel, et al (2002) "South Africa Employment Relations: Theory and Practice" Van Skaiks Publishers.

Brand, Lotter, Steadman & Ngcukaitobo (2008) "Labour Dispute Resolution" Second Edition Juta & Co.

Trollip (1991) "Alternative Dispute Resolution" Durban: Butterworths.

Anstey (2006) "Managing Change Negotiating Conflict" Third Edition Juta Academic Ebooks.

Davie and Freedland (1983) "Kahn-Freund's Labour and the Law", Third Edition, Stevens.

## Conventions

International Labour Organisation - The Termination of Employment convention – C158

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:312303:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312303:NO) (accessed on 16 November 2017)

## Journal Articles

Bhorat "Understanding the efficiency and Effectiveness of the Dispute Resolution System in South Arica: An analysis of the CCMA Data" 2007 University of Cape Town, DPRU 12.

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

Van Niekerk "The Plurality of Legal Domains in South Africa: The States Historical Legislative Intrusion into the Field of Urban Popular Justice and Customary Law" in Scharf and Nina (eds) "The outer law: Non-State Ordering in South Africa" 2001, Juta, Lansdowne 14.

Du Toit "Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law" 2008 125 SALJ 95.

Bosch, et al. "Conciliation and Arbitration Handbook: A Comprehensive guide to labour dispute resolution procedures" 2004 LexisNexis 11.

Swartz Journal of Moral Education, 2006 560-561.

Mischle Contractually Bound: Fairness, Dismissal and Contractual Terms (2004) CLL 13(9) 82.

Smit "Disciplinary enquiries in terms of schedule 8 of the labour relations act 66 of 1995", PhD thesis, University of Pretoria, 2010 79.

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

Tokiso the Dispute resolution digest 2015, Mandatory mediation in South Africa: are there constitutional implications? John Brand and Chris Todd page 47 to 64

Israelstam "There is a significant number of referrals based on facts that are misrepresented" in The South African labour guide available at <http://bit.ly/1MdTmQa> (accessed on 8 September 2017).

Smit A critical analysis of " absoluteion from the instance " in South African labour law with specific reference to the CCMA 2016 (79) THRHR page 95.

Brian Doyle, Arbitration 2015, 81(1), 20-24 WESTLAW.

Purcell, UK “Individual disputes at the workplace – alternative dispute resolution”  
<http://www.eurofound.eu/observatories/eurwork/comparative-informatin/national-contributions/united-kingdom/uk-individual-disputes-at-the-workplace-alternative-dispute-resolution-2010-02-09> (accessed on 2017-11-16).

<http://www.labourguide.co.za/ccma-informations/158-bringing-trivial-case-to-ccma-could-cost-you> accessed on 08 September 2017

Draft Negotiating Document in the Form of a Labour Relations Bill, GG 16259, 10 February 1995, 110-111.

Explanatory Memorandum (1995) 16 ILJ.

Labour Market Reform in the United Kingdom: From Thatcher to Blair John T. Addison University of South Carolina and University Birmingham (U.K.) W. Stanley Siebert University of Birmingham (U.K.)

### **Table of Statutes**

Constitution of the Republic of South Africa, 1996.

Interim Constitution Act 200 of 1993.

Labour Relations Act 66 of 1995.

Industrial Conciliation Act 11 of 1924.

Wage Act of 1925 Act 27 of 1925.

Black Labour Relations Regulation Act 48 of 1953.

Industrial Conciliation Act 28 of 1956.

Labour Relations Amendment Act 9 of 1991.

Industrial Conciliation Amendment Act 94 of 1979

Labour Relations Amendment Act 12 of 2002.

Employment Act of 2008

Employment Tribunals Rules of Procedure 2013

Rules of Conduct of Proceedings before the CCMA

### **Table of cases**

CCMA v The Law society of the Northern Provinces (005/13) ZASCA 118.

Rose Ramchau v Ackermans (NP856-01)

Ntombela v SMT Health Solutions (KNDB10811-08).

Shoprite Checkers (Pty) Ltd v Ramdaw N.O & others (2000) 21 ILJ 1232 (LC).

CCMA v Law Society, Northern Provinces CCMA v Law Society, Northern Provinces (005/13) [2013] ZASCA 118 (20 September 2013).

Maseko v Entitlement Experts [1997] 2 BLLR 317.

NEWU v CCMA [2004] 2 BLLR 165 (LC)

Premier, Gauteng & another v Ramabulana NO & others [2008] 4 BLLR 299 (LAC).

Kasipersad v CCMA [2003] 2 BLLR 187 (LC).

Hofmeyer v Network Healthcare Holdings (Pty) Ltd [2004] 3 BLLR 232 (LC)

Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC)

Norman Tsie Taxies v Pooe NO & Others (2005) 26 ILJ 109 (LC).

Commission for Conciliation, Mediation and Arbitration & Others v Law Society of the Northern Provinces (incorporated as the law Society of the Transvaal) (2013) 34 ILJ 2779 (SCA).

NUMSA v Driveline Technologies [2000] BLLR 20 (LAC)

R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51.

CCMA v Law Society, Northern Provinces CCMA v Law Society, Northern Provinces (005/13) [2013] ZASCA 118 (20 September 2013).

## **Reports**

The CCMA Annual Report 2015/2016 (available at <http://www.ccma.org.za>).

ACAS referral form ET1

<https://www.cilex.org.uk/pdf/pdf%20ET1%20Form%20for%20SA%20ONLY.u19%20June%202011.pdf> (accessed on 16 November 2017)

CCMA Referral form 7.11 <http://www.ccma.org.za/Advice/CCMA-Referral-Forms>  
accessed 16 November 2017.

ACAS referral process <http://www.acas.org.uk/index.aspx?articleid=4028> accessed  
on 16 November 2017.